Supreme Court, U.S.
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No. 03-

In the Supreme Court of the United States

JERRY PAUL HENDERSON,
Petitioner,

v.

DONAL CAMPBELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL FOR THE STATE OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER MR. HENDERSON HAD, CONTRARY TO THE COURT OF APPEALS' DECISION, "CAUSE" TO EXCUSE THE STATE PROCEDURAL DEFAULT OF HIS CLAIM THAT HIS APPOINTED ATTORNEY'S CONFLICTS OF INTEREST PRODUCED THE WAIVER OF MR. HENDERSON'S STATE POST-CONVICTION REMEDY?

II. WHETHER THE PROOFS DISCLOSE THAT MR. HENDERSON'S WAIVER OF HIS STATE, POST-CONVICTION REMEDIES IS THE PRODUCT OF THE OUTSIDE, UNDUE INFLUENCE OF AN APPOINTED ATTORNEY WITH MULTIPLE CONFLICTS OF INTEREST, THUS PROVIDING "CAUSE" FOR THAT WAIVER?

III. WAS MR. HENDERSON'S WAIVER OF HIS RIGHT TO PROCEED UNDER ALABAMA RULE 32 NOT KNOWING, VOLUNTARY AND INTELLIGENT, THE COURT OF APPEALS' CONTRARY CONCLUSION BEING AT ODDS WITH BASIC WAIVER PRINCIPLES APPLICABLE TO THIS CAPITAL CASE?

PARTIES TO THE PROCEEDING

The Petitioner is Jerry Paul Henderson. The Respondents include Donal Campbell, Commissioner of the Alabama Department of Corrections, and the Attorney General of the State of Alabama.

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The Opinion of the United States Court of Appeals for the Eleventh Circuit is published. 353 F3d 880 (12/16/03; Appx. C, p. 5a). The Judgment of the United States District Court for the Northern District of Alabama is not (Appx. D; 44a; Appx. E; "Final Judgment" [entered: 10/31/01] [ND Ala. No. 00-0941]).

BASIS FOR JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Eleventh Circuit on December 16, 2003 (Appx. C). Petitioner filed a timely Petition for Rehearing and for Rehearing En Banc on December 30, 2003, which the Court of Appeals denied on February 18, 2004 (Appx. A).

Thus, Petitioner timely seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

28 USC § 2254 (Appx. I).

STATEMENT OF THE CASE

1. Proceedings

Jerry Paul Henderson petitioned for a writ of habeas corpus on April 11, 2000. The United States District Court had jurisdiction under 28 USC § 2241 and 2254. The United States Court of Appeals for the Eleventh Circuit had jurisdiction under 28 USC § 2253, based on the District Court's issuance of a limited certificate of appealability (Appx. G; 130-132a).

On November 6, 1987, Mr. Henderson was indicted for the capital murder of Jerry Wayne Haney. Two court-appointed attorneys represented Mr. Henderson at trial, which commenced in Talladega County (Alabama) Circuit Court on May 16, 1988. The jury convicted Mr. Henderson of capital murder on May 19, 1988. Alabama Code §§ 13A-5-40(a)(2) and (7) (murder during robbery and murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire). The same day, the penalty phase commenced. Shortly after the jury began its deliberations, the jury returned a verdict, after 11:00 p.m., recommending, by the minimum, 10-2 vote, a sentence of death by electrocution (State Court Record; P-22; at 785)[1]. On June 14, 1988, the trial court sentenced Petitioner to death.

The Alabama Court of Criminal Appeals and Supreme Court affirmed Mr. Henderson's conviction and death sentence. Henderson v State, 583 So2d 276 (Ala. Cr. App.

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[1] All "P-___" references are to the State Court record as transmitted to the United States District Court for the Northern District of Alabama (U.S. D. Ct. Doc. No. 24).

1990); Ex Parte Henderson, 583 So2d 305 (1991). This Court denied certiorari on March 2 the following year. 503 US 908 (1992).

On October 13, 1993, a Maryland attorney, Mr. Jack Gohn, filed on Mr. Henderson's behalf a petition pursuant to Alabama Rule of Criminal Procedure 32, for relief from judgment (P-39). Mr. Gohn withdrew from Mr. Henderson's representation on April 5, 1994. On July 30, 1996, the Talladega County Circuit Judge appointed Mr. Steve Giddens, of Talladega, to represent Mr. Henderson.

On April 22, 1997, Mr. Henderson appeared with Mr. Giddens before the trial judge for what was to have been a hearing on the Rule 32 Petition, but instead turned into a "waiver hearing." (P-41; TR., 4/22/97). On May 29, 1997, the Talladega Circuit Judge issued an order finding, "for good cause shown," that "Jerry Henderson ... is hereby allowed to dismiss his Rule 32 Petition" (P-47).

On or about July 10, 1997, newly-retained counsel filed a Notice of Appeal from the Circuit Court's dismissal of Mr. Henderson's Rule 32 Petition (P-43; Ala. Cr. App. No. 96-2293). In October of 1997, current counsel entered their appearance and submitted a brief on behalf of Mr. Henderson to the Alabama Court of Criminal Appeals. That Court affirmed the dismissal order on August 14, 1998. Henderson v State, 733 So2d 484 (1998). The Alabama Supreme Court granted Mr. Henderson's Petition for Writ of Certiorari (on October 19, 1998), but later reconsidered and quashed the writ, denying same, on April 23, 1999 (Ala. S. Ct. No. 1980085).

After Mr. Henderson petitioned for the writ of habeas corpus, the Magistrate Judge ordered an "evidentiary hearing", on the following issues:

1. What Petitioner was told by his attorney [Steve Giddens] prior to dismissing his Rule 32 Petition in state court;

2. Whether Steve Giddens, Petitioner's Rule 32 counsel, was aware at the time of Petitioner's Rule 32 proceeding that his brother had prosecuted Petitioner; whether he discussed this fact with Petitioner; and if he did not discuss this fact for the Petitioner, why he did not do so; and

3. If Steve Giddens did not discuss with Petitioner the fact that his brother had prosecuted Petitioner, whether the lack of disclosure deprived Petitioner of the opportunity to make a knowing, intelligent and voluntary waiver of his right to pursue collateral relief, such that the state court's finding that Petitioner knowingly, intelligently and voluntarily waived his right to pursue collateral relief is an unreasonable determination of the facts in light of the evidence presented.

(Appx. H, pp. 133-134a; 1/18/01).

The Magistrate Judge overruled Respondents' objections to the evidentiary hearing (Appx. F; 126a). In so ruling, the Magistrate Judge stated:

> "If, however, Henderson waived the Rule 32 proceeding as the result of undue influence, then there is the possibility that the waiver of the Rule 32

> Petition was involuntary. If the waiver is involuntary, then this may be 'cause' sufficient to excuse Petitioner's failure to pursue the claim of ineffective assistance of trial and appellate counsel in the Rule 32 proceeding. *** The trial court never had the opportunity to address whether the apparent conflict of interest presented by defense counsel's relationship to a prosecutor in Petitioner's case resulted in actions which could have subverted Petitioner's free and responsible choice to decide whether to go ahead with the Rule 32 proceeding.
>
> "To allow an involuntary waiver of the Rule 32 proceeding would be contrary to clearly established federal law. Further, the existence of a conflict of interest by Rule 32 counsel, if it was present, could not have been discovered previously by Petitioner unless he was informed of it by Rule 32 counsel himself. Therefore, he could not have raised this issue in his Rule 32 Petition." [Appx. F, 128a (emphasis added)].

Following the hearing, however, the Magistrate Judge recommended dismissal of the entire petition (Appx. E; 9/21/01; 46a). Overruling Mr. Henderson's timely objections, the District Court adopted the Magistrate Judge's Report and Recommendation, and entered final judgment, denying the Petition on October 31, 2001 (Appx. D; 44a). The District Court did grant Mr. Henderson a Certificate of Appealability, limited to the Rule 32 waiver issue (Appx. G; 131-132a; 1/29/02).

By Opinion filed December 16, 2003, the United States Court of Appeals for the Eleventh Circuit concluded that Petitioner had procedurally defaulted his claim that he had

waived his ineffective assistance of counsel claims by waiving his right to a hearing under Rule 32, and that the waiver was not for "cause" (Appx. C; 353 F3d 880). The Court rejected Petitioner's challenge to the District Court's conclusion that the undisclosed conflicts of interest of his appointed counsel constituted a sufficient, outside influence, thus producing the waiver, and constituted "cause" for that waiver for habeas purposes. The Court further held that the argument, even if not procedurally defaulted, lacks merit, and that the Alabama courts had not unreasonably applied federal law by upholding the Rule 32 waiver, against Mr. Henderson's argument that the waiver was not knowing, voluntary and intelligent. The Court of Appeals denied Mr. Henderson's timely Petition for Rehearing/Rehearing En Banc (Appx. A; 2/18/04; 1a), but granted Mr. Henderson's further motion for stay of the issuance of the mandate pending Petition for Writ of Certiorari, "to and including May 18, 2004" (Appx. B; 3-4a).

2. The State Court Trial

Mr. Henderson's lead trial counsel, in introducing himself to the Court at the onset of trial, announced the withdrawal of Mr. Henderson's plea of not guilty by reason of insanity, and seconds thereafter, inquired of the prosecutor, "Do you think we will be to the sentencing phase by Thursday?" (P-2; pp. 9-10).

The trial did reach the sentencing phase by Thursday, defense counsel having presented no defense to the capital charge against his client. The jury found Mr. Henderson guilty of murdering his sister-in-law's (Judy Haney's) husband, Jerry Haney. The penalty phase proceeded immediately, and defense counsel proffered their proofs in a starkly abbreviated manner (P-16; pp. 670-713). Some slight evidence was presented that Jerry Haney had mistreated his

family. Thus, Mr. Henderson testified, recalling that Judy Haney and her children, Tonya and Gary, "did come to stay with us" in December, 1983, "because of the trouble that Judy was having with Jerry" (id., 676-677):

> "They were fighting and arguing -- I got to talk to Judy some and I heard her and Martha talking about Jerry's hostility towards her and the kids. Tonya at the time had her fingernails bit above the quick of her fingers. When Judy mentioned that Jerry was coming after them, Tonya went into hysterics saying that she didn't want her daddy to come get her, that she wanted to stay there. I could see terror in her eyes. Excuse me. I've never mistreated or hurt the child. I don't believe -- I become very angry when somebody does. I'm sorry, but it's just in me. I can't stand it, I just become over angry and I just couldn't control myself."

Judy Haney had told Mr. Henderson that her husband had beat her as well. Id., 686.

The defense also offered the testimony of Dr. Michael Lazarescu, who had examined Mr. Henderson in May of 1988, not long before the trial (P-16; at 691). The witness had found Mr. Henderson to be "mentally competent," but did note that Mr. Henderson had a very "unhappy childhood" and he felt he was "unloved and was a rejected child," having been "raised in different parts of the State". Id., 692. He had developed a "feeling to protect children -- very, very impressed all the time when people mistreated children," to the point where he "tries to defend them." Id. Petitioner was "very depressed," and "expressed sincere feelings of guilt and remorse." Id. Henderson had "abused marijuana and alcohol," and had attempted suicide. Id., 693. The pre-

sentence report -- although not the trial testimony -- shows a "bullet wound" to Mr. Henderson's "left chest," along with an "18-inch surgical scar" (R-57).

Mr. Henderson's father, Paul A. Henderson, confirmed the shuffling about of Jerry Henderson during the course of his childhood (P-16; at 708). In his extremely brief testimony, the elder Henderson stated:

> "Well, I would like to ask them to have mercy on him and let him live because he is all I've got. My wife died about two years ago. I got married to her after Jerry had left home and she died about two years ago. He's all I've got." Id., 709.

Finally, the daughter of Jerry Haney, Tonya, testified that she visits Mr. Henderson in prison, and has known him most of her life, and that she did not "think he should die for what he has done." Id., 710-712.

The jury thus scarcely knew anything about this man, whom they condemned to die by the minimum vote of 10-2. Neither the jury nor the sentencing judge knew anything about the softer, more human side of this Defendant who, admittedly, did kill the decedent, but not as the prosecution portrayed it, as a cold-blooded murder-for-hire. Rather, it was an emotionally-driven killing, motivated by, among other things, a sincere desire to protect Mr. Henderson's sister-in-law, Judy Haney, and her children, most especially her minor daughter, Tonya.

At a hearing held on June 14, 1988, the Trial Judge sentenced Petitioner to death by electrocution (P-23). There was virtually no allocution on behalf of Mr. Henderson either by himself or his attorneys. Id. at pp. 785-789.

Jerry Paul Henderson was born on December 8, 1946 (Doc. 24; R 57). According to the pre-sentence report, relied upon by the sentencing judge in this case:

> "When he [Henderson] was a very small baby his mother deserted the family. He was raised primarily by his grandmother ... until he was approximately 10 years of age and she passed away and then by various aunts and uncles until he reached maturity. This was the only significant problem noted during his formative years" [Id., 62; emphasis added].

No exception was taken to this report, nor any effort made by defense counsel, either before the jury or the Court at sentencing, to elaborate in any way upon the true history of their client, or add substantially to it, leaving the sentencing judge to himself note that the defense had presented "little evidence of mitigating circumstances" (Doc. 24; P-24; at R-76). In his Sentencing Findings, the Judge noted the absence of prior violent felonies, and found that this offense was "not especially heinous, atrocious or cruel, compared to other capital offenses". Id., 79. The Court, however, after a diligent search of the evidence offered by the defense and of the pre-sentence report, could find "no mitigating circumstance, statutory or non-statutory" Id., 80.

Mr. Henderson was represented by two court-appointed attorneys at trial, and by the same attorneys on appeal, one of whom was paid $2,556 and the other $2,405 for their efforts in Circuit Court and, together, spent a total of 158.7 hours on the case, about 90 of which were spent in court and about 70 out-of-court. Trial counsel did not seek the assistance of the Circuit Court in retaining the services of an investigator. Their attorney fee declaration and the attachments thereto reflect little or no work in terms of background preparation,

interviewing witnesses, or seeking information to show mitigating circumstances. Available witnesses could have spelled out the breadth and depth of the abuse suffered by Jerry Haney's family at his hands, as they did in a Rule 32 hearing in the case of State v Judy Haney, which yielded a life sentence, and which took place just before Mr. Henderson's Rule 32 "waiver".

3. The Rule 32 Proceeding

On October 13, 1993, a Maryland attorney, Mr. Jack Gohn, filed on Mr. Henderson's behalf a Petition pursuant to Alabama Rule 32 for relief from judgment. Mr. Gohn withdrew on April 5, 1994. Petitioner was without counsel for over two years until the Circuit Court appointed a local attorney, Mr. Steve Giddens (P-43; pp. 153-154). Nine more months later, on April 22, 1997, Mr. Henderson appeared with Giddens for what was to have been the hearing on his Rule 32 Petition. It turned into the waiver hearing (P-41; pp. 1-12).

From the date of Giddens' appointment, Mr. Henderson had heard not a single word from Mr. Giddens, and never even knew that he was being represented. Mr. Henderson did not know why he was being brought back to the Talladega County Jail, but presumed it had something to do with the prosecution of his sister-in-law, Judy Haney.

On April 22, 1997, Mr. Giddens stated that he had seen his client the day before and that "was the first time he [Mr. Henderson] had actually seen the [Rule 32] Petition". Id., p. 2. Mr. Henderson "wasn't sure what most of the allegations even meant". Id., p. 3. Mr. Giddens indicated in a general sort of way that Henderson "had no complaints" about either of his court-appointed trial attorneys. Id. Mr. Giddens

indicated that Mr. Henderson wanted "his petition dismissed." Id.

The Circuit Judge conducted some voir dire of the Defendant with regard to his understanding, or lack of same, of the Rule 32 proceeding, asking him whether he understood "what this Rule 32 was all about?", to which Mr. Henderson answered, "Yes, sir. I understand that". Id., p. 6. Mr. Henderson also answered affirmatively when asked whether he understood that by dismissing the Petition, he would place himself "a step closer to having your sentence to the electric chair carried out?" Id. Finally, the Circuit Judge asked Mr. Henderson whether he was "making this decision of [his] own free will, knowingly and voluntarily," to which Petitioner answered, "Yes, sir". Id., p. 7.

Henderson never saw nor heard from Giddens again. Giddens now occupies the position of district attorney for Talladega County, and is the brother of one of the prosecutors who tried this case and delivered the closing argument against Mr. Henderson, and in favor of his conviction and death sentence (P-3, at R-4; P-6 at 176; P-7 at 566, et. seq. [Clg. Arg.]).

4. The District Court Hearing

At the evidentiary hearing held in the Federal District Court, Steve Giddens testified that Talladega is a town of "about 20,000 people," with perhaps 35-40 attorneys with offices there (TR., 6/25/01, 7-8). About 8-10 of those attorneys are principally involved in the practice of criminal law. Id., 8. His brother, Rod Giddens, was one of the prosecuting attorneys at the trial of Mr. Henderson's case in Talladega County, an Assistant Talladega County Prosecutor at that time. Id., 8. The Giddens brothers are close with one

another, and visit each other "several times a week." Id., 10. Rod Giddens is now a criminal defense lawyer, while Steve Giddens himself "became District Attorney in January of 1999." Id., 6, 11.

Steve Giddens knows policeman Billy Haney, brother of the deceased, Jerry Haney, quite well. Id., 11. He and Steve Giddens "cross paths", due to Billy Haney's involvement in cases prosecuted by Steve Giddens, and before ~~that,~~ in cases in which Steve Giddens acted as a defense attorney. Id., 12-13. But the relationship goes beyond that. "Billy and I are friends," Steve Giddens testified. Id., 13. Indeed, they "were friends prior to [Steve Giddens] becoming an attorney," and have known each other for over two decades ("I've known Billy since the seventies, at least"). Id., 13. Steve Giddens had expressed his condolences to Billy Haney upon the death of his brother. Id., 14.

Steve Giddens reviewed ~~the~~ Rule 32 Petition "to see what Mr. Henderson's claims were." Id. Steve Giddens testified that the majority of Mr. Henderson's claims "were ineffective assistance of counsel," and quickly evaluated them as being "without merit." Id., 14-15. Mr. Giddens further testified:

> Q: And what did you base that upon?
>
> A: That I knew the attorneys and I just didn't feel like that they were ineffective. I also was familiar with the evidence against him. Id., 15.

Steve Giddens had followed the Henderson trial and had read about it in the local newspapers; he had already formulated an opinion that Henderson was probably guilty. Id.

Steve Giddens did not "recall" attending the Henderson trial, testifying that "I don't remember watching any of his trial," though he "may have." Id., 16. He conceded that the trial generated alot of publicity, and that he had read newspaper accounts of the proceedings. Id. It was a hot topic in Talladega at the time. Id. He knew of the verdict and of the death sentence. Id., 16-17. He felt that Mr. Henderson had gotten what he deserved ("Yes, sir, I did"). Id., 17.

Giddens concluded that there was no need to go forward the next day because Mr. Henderson had no complaints against trial counsel. "To a certain extent, he wanted it dismissed." Id., 25.

Mr. Giddens' testimony makes it fairly obvious that he had not reviewed the record of Mr. Henderson's case in anywhere near its full entirety. He did not feel the claim relating to the trial court's failure to life qualify jurors had any merit, for example, stating that he "felt comfortable that all of that had been done, that the jury was qualified on their feelings on the death penalty versus life without parole." Id., 26-27. When asked whether he had read the transcript of the voir dire proceeding, Giddens answered, "I looked at his transcript, yes, sir." Id., 27. When asked again whether he had reviewed the transcript of Mr. Henderson's trial, Giddens responded, "I reviewed some of the transcript, yes, sir." Id., 28. He stated that he had reviewed "some of the voir dire, some of the pretrial motions" and that he "knew enough about, from reading his petition, what his claims were." Id., 28. He does not recall whether he read the transcript of the penalty phase of the trial at all. Id., 28. He did not "have an opinion" whether trial counsel had adequately presented mitigating circumstances to the jury. Id. Once he heard from Mr. Henderson that the latter had no complaints about his

trial attorneys, the "conversation took a turn in a different direction," Mr. Giddens recalled. Id., 29.

Steve Giddens was familiar with the prosecution of Judy Haney, which was also related to the killing of Jerry Haney (Judy Haney was Jerry Haney's wife). Id., 33. The Judy Haney case had also attracted considerable publicity in Talladega County. Id., 33. Steve Giddens remembered Judy Haney's trial, but claimed not to recall the Rule 32 proceeding in Judy Haney's case, which took place in February, 1997, two months prior to the "waiver" hearing in question here. Id., 33-34.

Steve Giddens never spoke with Jack Gohn, nor with Mr. Henderson's trial attorneys (Messrs. Pitts and Adams). Id., 35. He claimed he never spoke with Rod Giddens about the Judy Haney case, nor about Jerry Haney's murder, more generally. Id. He even claimed he never spoke with his brother about Jerry Henderson nor the case against Jerry Henderson until he received the Order in reference to the evidentiary hearing held before this Court on June 25, 2001. Id., 35-36.

Steve Giddens denied that he knew that his brother, Rod Giddens, had been a prosecutor in the case of State v Henderson. Id., 36-37. On examination by Respondent, Steve Giddens further testified that he had shared office space with his brother, Rod, in two different timeframes, first in 1987, and then from between 1992 or 1993 until the time of Steve Giddens' election as prosecutor (in November of 1998). Id., 6-7, 41. This included the time in which Steve Giddens represented Petitioner. Id., 42. Had he known of the conflict, Giddens claimed, he "would have asked Judge Fielding if he wanted somebody else and withdrawn." Id.,

50-51. He never told Mr. Henderson that he and Billy Haney are long-time friends. Id., 57.

Mr. Giddens' brother was the direct examiner of five prosecution witnesses (P-6, p. 176, 290, 294, 317, 417), and gave the closing arguments in both the guilt and penalty phases (P-8, at P-567; P-18, 755, et. seq.).

If Giddens had told Henderson that he had shared office space with a brother who had been one of the trial prosecutors against him, Mr. Henderson would have chosen not to go forward with Mr. Giddens. (Doc. 39; TR. 6/25/01, p. 64). He would have felt that Giddens "would already have something against me from the get-go. It just wouldn't have felt right." Id., 64.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THE COURT OF APPEALS' DECISION, WHICH IS INCONSISTENT WITH THIS COURT'S DECISIONS WITH RESPECT TO THE "CAUSE AND PREJUDICE" STANDARD, INCLUDING EDWARDS v CARPENTER, MR. HENDERSON HAD "CAUSE" TO EXCUSE THE WAIVER OF HIS APPOINTED ATTORNEY'S CONFLICTS OF INTEREST, WHICH CONFLICTS WERE PRODUCTIVE OF MR. HENDERSON'S WAIVER OF HIS STATE POST-CONVICTION REMEDIES

Under 28 USC § 2254(d):

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." [Appx. I; 136a].

In Williams v Taylor, 529 US 362; 120 S Ct 1495; 146 LEd2d 389, 430 (2000), this Court construed this provision as follows:

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the State court arrives at a conclusion opposite to that reached by this Court on a question of law or if the State court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the State court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

The Court may not issue the writ if an adequate and independent State-law ground justifies the prisoner's detention, regardless of the federal claim. One such "State ground" is a procedural default, such as the failure to raise the federal claim at the proper time in the State court

proceedings. Edwards v Carpenter, 529 US 446; 120 S Ct 1587; 146 LEd2d 518, 524 (2000). There are three situations in which a default will not bar relief:

1. Where failure to consider the prisoner's claims would result in a fundamental miscarriage of justice;

2. Where the State procedural rule was not firmly established and regularly followed; or

3. Where the prisoner has good "cause" for not following the State procedural rule and was "prejudiced" by not having done so.

Edwards v Carpenter, 146 LEd2d 518, 526 (Breyer, J., concurring in the judgment) (citations omitted).

Ineffective assistance of counsel is "cause" which excuses a procedural default in a habeas corpus proceeding, if the Petitioner establishes prejudice. Murray v Carrier, 477 US 478, 488; 106 S Ct 2639; 91 LEd2d 397 (1986). In this case, trial counsel's consistent lack of preparedness infected every stage of the proceedings. Mr. Henderson's Petition sets forth numerous instances in which his trial and appellate counsel's representation fell below objective standards of reasonableness, as judged by prevailing professional norms. Strickland v Washington, 466 US 668, 687-688; 104 S Ct 2052; 80 LEd2d 674 (1984). But for these errors, there is a reasonable probability that the result of the penalty phase would have differed, favorably to Petitioner. Strickland, at 693-694; 104 S Ct at 2067-2068; see, Williams v Taylor, 529 US 362. It is "past question that the rule set forth in Strickland," establishing the standards for determining effective assistance of counsel issues, "qualifies as 'clearly

established Federal law, as determined by [this] Court.'" Williams v Taylor, 146 LEd2d 389, 416.

But this case poses an additional layer of analysis: Mr. Henderson waived his state, post-conviction remedies by waiving his right to proceed with his Alabama Rule 32 hearing. Unless, the federal courts in this case have correctly noted, there is "cause" for this procedural default as well, then Mr. Henderson cannot properly bring his ineffective assistance and other claims before the Federal Courts by way of his habeas petition. This Court holds that a procedurally-defaulted ineffective assistance of counsel claim provides cause excusing a procedural default of another (substantive) claim in a habeas proceeding only if the Petitioner can establish cause and prejudice with respect to the ineffective assistance of counsel claim itself, or demonstrate "a sufficient probability that [a] failure to review his federal claim will result in a fundamental miscarriage of justice." Edwards v Carpenter, supra, 146 LEd2d 518, 524-525.

Mr. Henderson maintains that his waiver of his right to proceed with the hearing under Alabama Rule 32 is the product of an outside influence: the conflict-ridden influence of the Court-appointed attorney, Mr. Giddens.

The U.S. Court of Appeals concluded that Mr. Henderson cannot satisfy the "cause and prejudice" standard with respect to the procedural default of his Alabama Rule 32 waiver argument, because he never raised that question (Giddens' conflicts of interest) before the Alabama courts. In fact, even the Magistrate Judge noted that the existence of Giddens' conflicts "could not have been discovered previously by Petitioner unless he was informed of it by Rule 32 counsel himself" (Appx. F; 128a). Further, the Court of Appeals' own decision shows the impossibility of State Court

presentment. The judgment on direct appeal issued back in 1990, and was affirmed in 1991, with this Court denying certiorari in March of 1992. Any motion for new trial was due within 30 days of the judgment, as the Court of Appeals notes. 353 F3d 880, 899 (Appx. C; 39-40a). Further, a new Rule 32 Petition would have been barred by the one-year statute of limitations (post-judgment on direct appeal) or rejected as a successive petition. Ala. R. Cr. P. 32.2(b) and (c).

But it is worse than that. The Notice of Appeal from the Order of Dismissal of the Rule 32 Petition was not filed until July 10, 1997. The Order of Dismissal was entered by the Circuit Court on May 29 that year. More than 30 days had already passed. Far more than one year since the original judgment on direct appeal had gone by (indeed, more than five years since this Court had denied certiorari).

Nevertheless, the Court of Appeals states that "current counsel" could have raised this issue on the appeal to the Alabama Court of Criminal Appeals from the order dismissing the Rule 32 Petition (Appx. C; pp. 38-39a; 353 F3d at 899-900). Not so. Mr. Giddens' conflicts of interest were not part of the record at that point, and could form no legitimate argument before the Alabama Court of Criminal Appeals. Lewis v Oakley, 847 So2d 307, 311 (Ala. S. Ct. 2002).[2]

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[2] It was not until they reviewed the record while working on the appeal from the Rule 32 dismissal that current counsel noticed the identicality of the last names of the Rule 32 attorney and the prosecutor.

The Magistrate Judge correctly observed that if Mr. Henderson were to discover the conflicts of interest he would have had to have been informed "by Rule 32 counsel himself" (Appx. F; 128a). An attorney must inform his client of conflicts of interest, and secure consent to the representation "after consultation." Alabama Rule of Professional Conduct 1.7(b)(2). The client may waive the issue, but only in a knowing, intelligent fashion. Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019, 1023; 82 LEd 1461 (1938).

Giddens never told Mr. Henderson about his conflicts of interest. It was not up to Mr. Henderson, either before or after the Rule 32 waiver, to somehow discover what Mr. Giddens should have informed him of. Mr. Giddens' failure to inform Mr. Henderson of his conflicts itself poses "cause" for this procedural default. Giddens had an affirmative duty to raise the matter. See, Banks v Dretke, 157 LEd2d 1166, 1191-1194 (2004). Such a failure to inform the Petitioner implicates the "cause" inquiry, and "turns on events or circumstances 'external to the defense.'" Id.; quoting, Amadeo v Zant, 486 US 214, 222; 108 S Ct 1771; 100 LEd2d 249 (1988).

The concept of "cause" encompasses a "broad range of potential reasons" for the default, reasons which may occur in a "virtually limitless array of contexts." Reed v Ross, 468 US 1, 13; 104 S Ct 2901; 82 LEd2d 1 (1984). The unknown, unrevealed conflicts of interest on this attorney's part, together with the procedural deadlines appearing in the pertinent state court rules, demonstrate "cause."

II. MR. HENDERSON'S WAIVER OF HIS STATE POST-CONVICTION REMEDIES WAS THE PRODUCT OF THE OUTSIDE, UNDUE INFLUENCE OF AN APPOINTED ATTORNEY WITH MULTIPLE CONFLICTS OF INTEREST

Was the dismissal of Mr. Henderson's Rule 32 Petition based upon a legally-permissible conclusion that Mr. Henderson knowingly, voluntarily and intelligently waived his Rule 32 rights? Where important rights are at issue, the waiver thereof must be knowing, voluntary, and intelligent, that is, "an intentional relinquishment or abandonment of a known right or privilege." Johnson v Zerbst, 304 US 458, 464. The waiver of a right, whether "constitutional or statutory -- must be knowingly and voluntarily made"; it must be an "intentional relinquishment of a known right." United States v Bushert, 997 F2d 1343, 1351-1352, and fn. 20 (11th Cir. 1993); United States v Cockerham, 237 F3d 1179, 1181-82 (10th Cir. 2001). The waiver matter presents, at the very least, a mixed question of law and fact. Thompson v Keohane, 516 US 99; 116 S Ct 457; 133 LEd2d 383 (1995); Miller v Fenton, 474 US 104; 106 S Ct 445; 88 LEd2d 405 (1985).

In the "Order" of June 21, 2001, the Magistrate Judge noted that the "cause" which would excuse the Rule 32 waiver "must be found in some external source outside of Petitioner's control," so that if Mr. Henderson waived the Rule 32 proceeding "as the result of undue influence, then there is the possibility that the waiver of the Rule 32 Petition was involuntary." (Appx. F; 127a). See, Franklin v Hightower, 215 F3d 1196, 1201 (11th Cir. 2000) ("some objective external impediment to raising a claim properly in state court"). The Magistrate Judge framed three issues: (1)

Was Steve Giddens acting under a conflict of interest?; (2) Was Mr. Henderson aware of the conflict?; and (3) Did the conflict prejudice Mr. Henderson, that is, did Giddens improperly influence Mr. Henderson to drop the Rule 32 proceeding? (Appx. F; 128a).

In fact, the record shows: (1) Mr. Giddens was clearly acting under a conflict of interest, based not only upon his brother's prosecution of Mr. Henderson at trial, and in the sentencing proceeding, but also upon his close, longstanding friendship with the brother of the deceased, police officer Billy Haney; (2) Mr. Henderson was unaware of either of these conflicting interests, there being no evidence to show any such knowledge; and (3) that, most importantly, Mr. Giddens did unduly influence Mr. Henderson to waive his right to a hearing on his Rule 32 Petition.

The evidentiary hearing left no reasonable doubt that Steve Giddens knowingly acted under a conflict of interest. He claims not to have known that his brother prosecuted Mr. Henderson, even though: (a) he also claims to have reviewed significant portions of the transcript, which contains numerous references to his brother, who examined five witnesses on behalf of the prosecution, and gave the closing arguments in both the guilt and penalty phases; (b) he shared office space for several years with the same brother once the latter had entered private practice, an arrangement which continued through the timeframe in which Steve Giddens was Mr. Henderson's appointed attorney; (c) both Mr. Henderson's case and Judy Haney's case were high profile matters in Talladega; (d) he was good friends, and still is, with Billy Haney, who certainly would have mentioned to him that his own brother was one of the prosecutors; (e) this is a relatively close-knit community, with an even closer-knit legal

community, with just a couple dozen lawyers, a mere handful practicing criminal law as their specialty.

There is also the conflicting interest based on the relationship with Billy Haney. Billy Haney is a police officer who came to the scene of his own brother's murder. He sat at the prosecutor's table during all the trial proceedings, and was in attendance at the evidentiary hearing in the District Court. Steve Giddens has known Billy Haney for over two decades. They are quite well-acquainted, socially and professionally. Not only does this relationship demonstrate the absolute incredibility of Steve Giddens' testimony that he did not know that his own brother was Mr. Henderson's prosecutor, but it shows yet another conflicting interest on Mr. Giddens' part, insofar as his purported "representation" of Mr. Henderson is concerned. Under Alabama Rule of Professional Conduct 1.7(b):

> "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation ..."

Under Rule 1.8(i):

> "A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the

> lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

There is no evidence whatsoever that Mr. Henderson was aware of these conflicts. Even the Magistrate Judge observed that the conflicts "could not have been discovered previously by Petitioner unless he was informed of it by Rule 32 counsel himself" (Appx. F, 128a). Mr. Giddens, for his part, claims he did not even know his brother had been a prosecutor at Mr. Henderson's trial, and hence, did not testify that he told Mr. Henderson of that fact. Further, Mr. Giddens admitted that he did not even tell Mr. Henderson that he and Billy Haney were acquaintances, much less that they were longtime friends. Giddens admitted that if he did know he would be compelled to decline the appointment. This demonstrates his awareness of the significance of the conflict, and explains his motivation in denying knowledge that his brother was a prosecutor at Mr. Henderson's trial.

This leaves but one question: did Giddens unduly influence Mr. Henderson to waive his rights under Alabama Rule 32?

Let us review the relevant evidence adduced at the evidentiary hearing. Mr. Giddens considered Mr. Henderson guilty, and had that opinion for quite awhile before he even met his client. This influenced his efforts, or lack of same, the record makes rather clear. He reviewed no more than a few token smidgens, it appears, of the record in Mr. Henderson's case, contenting himself to glance over the Rule 32 Petition itself. He was appointed for nearly a year as Mr. Henderson's attorney, yet never bothered to meet with him nor even correspond with or telephone his client, much less Mr. Henderson's trial attorneys, Messrs. Pitts and Adams.

He assumed that the Petition had no issues with merit, and conducted no investigation whatsoever of the subject matter, either legal research or factual investigation. This is a capital case!

He then, at his first meeting with Henderson (the day before that scheduled for the Rule 32 hearing), and without a single witness subpoenaed for the following day, placed the entire burden of proceeding upon Mr. Henderson. When Mr. Henderson conceded to Mr. Giddens that he was guilty of the murder, Mr. Giddens not only did not advise Mr. Henderson of his remaining rights in this death penalty case, but actively steered the conversation toward a waiver of Mr. Henderson's rights under Alabama Rule 32. Mr. Giddens' entire attitude toward the matter (colored by his personal view of Mr. Henderson's guilt, and by his own relationships with both a prosecuting attorney in Mr. Henderson's case and the deceased's brother, Police Officer Billy Haney) was brought to bear upon Mr. Henderson at that point. A conflict-free attorney would not have treated Mr. Henderson in this fashion. There is very little doubt that Mr. Henderson would have proceeded with the Rule 32 hearing if a conflict-free attorney were appointed to represent him. He was worse off with Mr. Giddens than without him.

The actions of a conflicted, court-appointed attorney, and even the resulting omissions of such an attorney, constitute the sort of outside influence which meets the definition of "cause". Manning v Foster, 224 F3d 1129 (9th Cir. 2000); Hollis v Davis, 941 F2d 1471, 1479 (11th Cir. 1991).

Mr. Giddens' conflict did more than prevent him from acting as an effective advocate. His true motivation, whether he was willing to so confess or not, was to get Mr. Henderson to give up a fight which Giddens himself had no heart to

pursue. Not only did Giddens' conflicted status affect his actual performance, but it actually produced the Rule 32 waiver itself, in a very direct way.

Petitioner further submits that a waiver so obtained is not knowing, intelligent, and voluntary. Giddens' influence upon Mr. Henderson should "be seen as an external factor" in the Rule 32 waiver. Coleman v Thompson, 501 US 722, 754; 111 S Ct 2546; 115 LEd 2d 640, 672 (1991).

III. MR. HENDERSON'S WAIVER OF HIS RIGHT TO PROCEED UNDER ALABAMA RULE 32 WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT; THE PANEL'S CONTRARY CONCLUSION IS AT ODDS WITH BASIC WAIVER PRINCIPLES SET FORTH IN THIS COURT'S DECISIONS

The Alabama Courts held that the waiver was sufficient because Mr. Henderson was not insane, and the record showed that he had "made a rational choice" from his available options. 733 So2d 484, 489-490; citing, Rees v Peyton, 384 US 312; 86 S Ct 1505; 16 LEd2d 583 (1966); and, among other cases, Lonchar v Zant, 978 F2d 637 (11th Cir. 1992), cert den 507 US 956 (1993). Likewise, the Court of Appeals concluded that Mr. Henderson was competent to forego further legal proceedings (Appx. C; 28-31a). 353 F3d, 893-895.

The common thread of the decisions cited by both the Alabama Court of Criminal Appeals and the Eleventh Circuit Court of Appeals is that the death row inmate had decided to stop challenging his conviction and death sentence. Someone other than the inmate wished to proceed over the inmate's objection. Only where the inmate has actively fought to

hasten execution have the Courts applied a less stringent test than the "knowing, voluntary and intelligent" formula. Mr. Henderson does not wish to abandon his legal challenges to the death penalty imposed upon him by the Alabama courts. In these circumstances, application of the "Rees" and "Lonchar" line of cases represents an unreasonable application of clearly established federal law. 28 USC § 2254(d).

In Godinez v Moran, 509 US 389, 400-401, incl. fn. 12; 113 S Ct 2680; 125 LEd2d 321, 333, fn. 5b (1993), this Court distinguished between the evidence necessary to determine that the Defendant is "competent to stand trial," from that necessary "before he may be permitted to plead guilty or waive his right to counsel." As noted in Godinez, supra, at fn. 12:

> "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. *** The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced."

Acceptance of a waiver of an important constitutional or statutory right "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v Zerbst, 304 US at 465. A determination that Mr. Henderson was "competent" is certainly not enough; "the waiver must also be intelligent and voluntary before it can be accepted." Godinez, 509 US, 402.

CONCLUSION

Congress dictates exhaustion of state post-conviction remedies, 28 USC § 2254(b)(1)(A), yet state inmates have no right to counsel at all, much less effective assistance of counsel, in those same, post-conviction proceedings. Competent counsel is essential to an indigent death row inmate's ability to successfully navigate technical pleading requirements and preclusion doctrines. The "complexity" of this jurisprudence "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." Murray v Giarratano, 492 US 1, 14; 109 S Ct 2765; 106 LEd2d 1 (1989) (Kennedy, conc.). It is as if the law directs such prisoners: "Go ahead; try and swim for it." Mr. Henderson's attempt to swim was rendered impossible by a court-appointed attorney who saddled his client with the weights of his own, patent conflicts.

For these reasons, Petitioner, Jerry Paul Henderson, respectfully asks this Honorable Court to grant certiorari.

Respectfully submitted,

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& SCHWARTZ, P.C.
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-16901-P

[Filed February 18, 2004]

JERRY PAUL HENDERSON,
Petitioner-Appellant,

versus

DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, ATTORNEY GENERAL FOR THE STATE OF ALABAMA,
Respondents-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion December 16, 2003, 11th Cir., 2003, ___ F.3d ___)

Before: TJOFLAT, ANDERSON and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-16901-P

[Filed March 1, 2004]

JERRY PAUL HENDERSON,
Petitioner-Appellant,

versus

DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, ATTORNEY GENERAL FOR THE STATE OF ALABAMA,
Respondents-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

ORDER :

( ) The motion of Appellant, Jerry Paul Henderson, for (X) stay ( ) recall and stay-of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of Appellant, Jerry Paul Henderson, for

(X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 18, 2004, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certifcate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellant, , for a further stay of the issuance of the mandate is GRANTED to and including , under the same conditions as set forth inthe preceding paragraph.

( ) IT IS ORDERED that the motion of Appellant, , for a further stay of the issuance of the mandate is DENIED.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-16901

[Filed December 16, 2003]

JERRY PAUL HENDERSON,
Petitioner-Appellant,

versus

DONAL CAMPBELL,
Commissioner of the Alabama
Department of Corrections,
ATTORNEY GENERAL
FOR THE STATE OF ALABAMA,
Respondents-Appellees.

JUDGES: Before TJOFLAT, ANDERSON and HULL, Circuit Judges.

OPINION

ANDERSON, Circuit Judge:

Jerry Paul Henderson ("Henderson") was convicted of murder in the state courts of Alabama and received a death sentence. The district court denied Henderson's petition for

writ of habeas corpus pursuant to 28 U.S.C. § 2254 on each of the several asserted constitutional claims for relief. In denying Henderson's petition, the district court concluded that many of Henderson's claims, including those alleging ineffective assistance of trial counsel, had been procedurally defaulted by Henderson's voluntary dismissal of his Rule 32 state post-conviction petition prior to any adjudication on the merits. After denying the writ, the district court granted Henderson a certificate of appealability to review the district court's rejection of the following two alternative arguments of "cause" to excuse his procedural default: (1) Henderson's waiver of his right to proceed under Alabama Rule 32 was not knowing, voluntary, and intelligent, because Henderson lacked a sufficient understanding of his rights and the actual legal claims being dismissed; and (2) Henderson's waiver was involuntary because it was the product of the undue influence of a Rule 32 counsel saddled by conflicting interests.

I. BACKGROUND

On May 19, 1988, Henderson was found guilty of capital murder and sentenced to death in Talladega County Circuit Court in Talladega, Alabama. His conviction and sentence were subsequently affirmed by the Alabama Court of Criminal Appeals. *Henderson v. State*, 583 So.2d 276 (Ala.Crim.App. 1990).[1] The Supreme Court of Alabama affirmed, *Ex parte Henderson*, 583 So.2d 305 (Ala. 1991), and the Supreme Court of the United States denied Henderson's petition for writ of certiorari, *Henderson v. Alabama*, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 496(1992).

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[1] This published opinion affirming Henderson's conviction and sentence provides a full, concise recitation of the historical facts concerning the underlying criminal offense. *See* 583 So.2d at 280-81.

A. State Post-Conviction Proceedings

On October 13, 1993, two Maryland attorneys filed a petition in the state courts of Alabama on Henderson's behalf, seeking post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32.[2] Shortly thereafter, the two attorneys sought and received a withdrawal as counsel due to financial inability to continue on Henderson's behalf. The court then sought to replace Henderson's counsel, first seeking the assistance of Lisa Borden, an Alabama attorney who had appeared as local counsel along with the two Maryland attorneys. After Borden was unable to find substitute counsel for Henderson, Judge Fielding[3] granted her motion to withdraw on July 30, 1996, and appointed Steve Giddens ("Giddens") of Talladega to represent Henderson in the Rule 32 proceeding.

On April 22, 1997, approximately nine months after Giddens' appointment, an evidentiary hearing was held in the Rule 32 proceeding. At that hearing, on behalf of Henderson, Giddens moved to dismiss the Rule 32 petition. Giddens explained that he had discussed the petition with Henderson and that his client was satisfied with his trial counsel and did not want to continue the claims of ineffective assistance or pursue any other challenges to his conviction and sentence. Giddens told the court that he believed that Henderson was fully aware of the situation and had plenty of time to consider the decision. Judge Fielding engaged Henderson in an

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[2] Henderson's trial attorneys apparently represented him throughout the direct review of his conviction and sentence, while new counsel initiated these state post-conviction proceedings.

[3] Judge Fielding also presided over Henderson's 1988 capital trial.

extensive colloquy regarding his decision to dismiss the Rule 32 petition and its possible consequences.[4]

The court explained that Henderson's Rule 32 petition set forth allegations relating to his 1988 trial that would, if true, result in a new trial.[5] The court explained to Henderson that the dismissal would significantly impair Henderson's chances of any successful appeal from the Rule 32 proceeding as well as any chances of success in any subsequent action in federal court.[6] The court explained that the dismissal could speed up the date of his execution and would bring Henderson a step closer to having his sentence of death carried out.[7] To each of the court's explanations, Henderson acknowledged that he

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[4] *See Henderson v. State*, 733 So.2d 484, 485-88 (Ala.Crim.App. 1998) (quoting the entire colloquy between Judge Fielding and Henderson).

[5] *See id.* at 487 ("Do you understand that by filing this Rule 32 which is a post--collateral action really--that you are saying that something happened in the trial back in 1988 that would justify you getting a new trial. Do you understand that's what this Rule 32 is all about?").

[6] *See id.* ("Do you understand that by dismissing this petition for Rule 32 that you could hurt any appeal that you may have further on in the state courts and also in the federal courts if you decide to file a petition after today. Do you understand that?").

[7] *See id.* ("Do you understand that by dismissing this petition that you could be speeding up your date of execution? . . . . Do you understand by dismissing this petition that you are a step closer to having your sentence to the electric chair carried out? Do you understand that.").

understood.[8] He also agreed that he was making his decision out of his own free will, knowingly, and voluntarily, and that no one had threatened, coerced, made promises, or tricked him into dismissing the petition.[9] After this extensive colloquy, the court found that Henderson's motion to dismiss his Rule 32 petition was being made knowingly, intelligently, and voluntarily. As a result, Judge Fielding granted Henderson's motion to dismiss from the bench, and on May 29, 1997 entered a formal order with findings of fact and conclusions of law consistent with his findings.

Following the dismissal, Giddens and Henderson had no further communications with each other. On July 10, 1997, counsel from the Equal Justice Initiative in Montgomery, Alabama, filed a notice of appeal from the order dismissing Henderson's Rule 32 petition. In October of 1997, Henderson's current counsel took over and submitted a brief on behalf of Henderson to the Alabama Court of Criminal Appeals.

On appeal, Henderson argued that he "did not voluntarily, knowingly, and intelligently waive his post-conviction remedies under Rule 32," and asked the court to "reverse the order dismissing his Rule 32 petition and remand it to the circuit court for a full and fair evidentiary hearing." Henderson argued that he had seen the petition for the first

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[8] *See id.* (reporting that to each of these questions by the court, Henderson responded, "Yes, sir. I understand that.").

[9] *See id.* ("And you are making this decision of your own free will, knowingly and voluntarily. Is that correct.?" . . .. "Yes, sir. It is." . . .. "And no one has threatened you, coerced you, made promises or tricked you into making this decision that you have told us about today?" . . .. "No, sir they haven't.").

time just the day prior to the dismissal and was never made aware of the specific allegations contained therein. Consequently, he claimed that he could not under those circumstances effectively waive his post-conviction remedies.

On August 14, 1998, the Alabama Court of Criminal Appeals affirmed, holding that the circuit court was correct in finding that Henderson possessed requisite mental competence to dismiss his petition and that he did so voluntarily, knowingly, and intelligently. *Henderson v. State*, 733 So.2d 484 (Ala.Crim.App. 1998). In reaching its conclusion, the Alabama appellate court considered the colloquy between Judge Fielding and Henderson, and noted that Henderson was responsive and coherent during the colloquy and demonstrated "that he moved for a dismissal of the petition voluntarily, knowingly, and intelligently with an awareness of the consequences." *Id.* at 490. The court was satisfied that the record adequately illustrated that Henderson "understood the legal options available to him, and that he made a rational choice from those options." *Id.*

On October 19, 1998, the Supreme Court of Alabama granted Henderson's petition for writ of certiorari, but later reconsidered and quashed the writ on April 23, 1999. On October 27, 1999, Henderson filed a second Rule 32 petition in the Talladega County Circuit Court which was dismissed pursuant to Rule 32.2(b) (successive petitions) and (c) (statute of limitations) of the Alabama Rules of Criminal Procedure.

B. Federal Post-Conviction Proceedings

1. The 28 U.S.C. § 2254 Petition

On April 11, 2000, Henderson filed a petition for writ of habeas corpus in the United States District Court for the

Northern District of Alabama, pursuant to 28 U.S.C. § 2254, setting forth numerous constitutional claims for relief. Respondents, Michael Haley as Commissioner of the Alabama Department of Corrections, and William H. Pryor, Jr., the Attorney General of the State of Alabama, argued that all of Henderson's claims that could have been raised in the Rule 32 proceeding, including his claims of ineffective assistance of counsel, had been procedurally defaulted. Some of these claims were raised in the Rule 32 petition dismissed by Henderson, while other claims could have been but were never raised in the state courts at all. Alabama argued that Henderson failed to properly exhaust these claims, and because the claims could no longer be raised in the state courts, they had been procedurally defaulted. Several of Henderson's § 2254 claims, however, were raised either at trial or on direct appeal, and could not have been raised in the Rule 32 petition. Respondents challenged these particular claims only on the merits, conceding that they were not procedurally defaulted.

As to the claims included in the Rule 32 petition, Henderson argued that he lacked a sufficient understanding of these claims at the time of his motion to dismiss, and therefore, his dismissal was not knowing, voluntary, and intelligent. From that, Henderson argued, the district court should find sufficient "cause and prejudice" to excuse his procedural default. Also, for the first time, Henderson pointed out that Steve Giddens, his Rule 32 counsel, was the brother of one of the prosecutors who participated in his 1988 trial. Rod Giddens,[10] Steve's brother, second-chaired Henderson's

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[10] Any reference made in this opinion to "Giddens" refers to Steve Giddens, Henderson's Rule 32 appointed counsel. Rod Giddens, Steve's brother, will be referred to hereinafter in this

prosecution, examined several witnesses, and delivered parts of the state's closing argument in both the guilt-innocence and penalty phases of the trial. Henderson also noted for the first time in his federal petition, that Steve Giddens was a lifelong friend of the murder victim's brother, a local police officer named Billy Haney. Because of alleged conflicts arising from these relationships, Henderson argued that the dismissal of his Rule 32 petition was the product of the undue influence of Steve Giddens, his Rule 32 counsel, and therefore was not a knowing, voluntary, and intelligent waiver. On January 18, 2001, the magistrate judge entered an order directing an evidentiary hearing to be held.[11]

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opinion only by either his full name, as "Steve's brother," or simply as "Rod."

[11] The magistrate judge's order outlined the following issues to be addressed at the hearing:

> (1) What petitioner was told by his attorney, Steve Giddens, prior to dismissing his Rule 32 petition in state court;
>
> (2) Whether Steve Giddens was aware at the time of petitioner's Rule 32 proceeding that his brother had prosecuted petitioner; whether he discussed this fact with petitioner; and if he did not discuss this fact with petitioner, why he did not do so; and
>
> (3) If Steve Giddens did not discuss with petitioner the fact that his brother had prosecuted petitioner, whether the lack of disclosure deprived Henderson of the opportunity to make a knowing, intelligent and voluntary waiver of his right to pursue collateral relief, such that the state court's finding that petitioner knowingly, intelligently and voluntarily waived his right to pursue collateral relief is an unreasonable determination in light of the evidence

2. The Evidentiary Hearing

The evidentiary hearing on June 25, 2001, focused on three issues: (1) Was Petitioner's attorney, Steve Giddens, acting under a conflict of interest when he represented Petitioner at the hearing wherein Petitioner waived his right to the Rule 32 hearing? (2) If so, was Petitioner aware of it? (3) If there was a conflict of interest, did it prejudice Petitioner, i.e., did Petitioner's attorney improperly influence Petitioner to dismiss his Rule 32 proceeding? At the hearing, two witnesses testified: Steve Giddens and Jerry Henderson. Giddens testified that he was admitted to the bar in 1986 and opened a solo practice in Talladega. In 1989, he began to work for Legal Services Corporation of Alabama. Giddens returned to solo private practice in 1991, and continued to practice in that capacity until he was elected Talladega County's District Attorney in 1998. Talladega is a town of about 20,000 people with perhaps thirty-five to forty attorneys with offices there with about eight to ten of those attorneys principally involved in the practice of criminal defense law.

Giddens testified that his brother, Rod Giddens, was a former assistant district attorney in Talladega County, and was one of the prosecuting attorneys at Henderson's 1988

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presented.

On June 18, 2001, Respondents objected to the holding of an evidentiary hearing, arguing that Henderson had not developed a factual basis for this claim in his state court proceedings, and therefore had not demonstrated that he was entitled to a hearing under 28 U.S.C. § 2254(e)(2). The magistrate judge overruled the objection and proceeded with the evidentiary hearing. Because we resolve this case in favor of Respondents on other grounds, we decline to address the propriety of the magistrate judge's holding an evidentiary hearing.

capital murder trial. Giddens testified that he and his brother are close with one another, and visit each other "several times a week." No longer a prosecutor, Rod now practices as a criminal defense attorney in Talladega. In fact, at the time during Steve Giddens' representation of Henderson on his Rule 32 petition, he shared office space with Rod. Nevertheless, Giddens testified that until he received the federal district court's notice to appear at the June 25, 2001 evidentiary hearing in this case, he was unaware that his brother had participated in Henderson's 1988 prosecution.[12]

Steve Giddens also testified that he is friends with Billy Haney, a local police officer and brother of the victim. Their friendship dates back to the 1970s. Giddens testified that he expressed his condolences to Billy Haney upon the death of his brother. Giddens admitted that he never told Henderson about his relationship with the victim's brother.

Giddens testified that at some point after Judge Fielding appointed him to represent Henderson in the Rule 32 proceeding, he reviewed the court file containing the Rule 32 petition. He determined that most of the claims set forth in the

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[12] Giddens explained that he had never known his brother to second-chair in a capital murder case while working as a prosecutor. Giddens acknowledged, however, that the district attorney's office had only four assistant prosecutors with two of those four individuals working only part-time. Also, Rod Giddens' name appears on one of the face sheets of the record, and as the direct-examiner of five prosecution witnesses and the deliverer of parts of two closing arguments, his name appears within several different parts of the trial transcript. Because he reviewed only small parts of the record in his preparation for the Rule 32 proceeding, Giddens claimed that he never came across his brother's name in the record.

petition were ineffective assistance of trial and appellate counsel. Giddens reviewed a small part of the trial transcript that included "some of the voir dire" and "some of the pretrial motions." Giddens testified that his quick review of parts of the record convinced him that most of the claims in the Rule 32 petition were without merit. Giddens testified that he based this opinion at least in part on the fact that he personally "knew the attorneys and . . . just didn't feel like they were ineffective" in light of what he had ascertained from the media coverage of the 1988 trial. Giddens did not recall attending the Henderson trial, but "may have." He conceded that it was a high profile case in Talladega generating a great amount of publicity. Giddens acknowledged that from these reports, he had already formulated an opinion that Henderson was probably guilty. Giddens even conceded that he had felt that Henderson "had gotten what he deserved." Yet, when Judge Fielding appointed him to represent Henderson, Giddens testified that he did not pause, or feel any concern about the appointment.

Giddens stated that he first met Henderson at the county jail the day before the April 22, 1997 hearing on the Rule 32 petition. During the approximately nine months that had transpired since his appointment, no prior communication of any sort had taken place with Henderson via mail, telephone, personal contact, or otherwise. Giddens introduced himself, explained to Henderson the nature of the proceeding, went over the nature of the claims with Henderson, and told him that most of the claims alleged ineffective assistance of trial and appellate counsel. Giddens informed Henderson what evidence could be presented the next day at the evidentiary hearing and what type of potential relief was available. Henderson "responded that he was not sure what this was all about, that he did not have any problem with his attorneys because he was guilty, and that they did as well as they could

do defending a guilty man." Giddens testified that he was surprised that Henderson was so candid and that after Henderson stated that he had no complaints about his trial attorneys, the "conversation took a turn in a different direction." Henderson and Giddens agreed that they would dismiss the Rule 32 petition at the hearing the following day. Giddens testified that he was prepared to go forward if Henderson so wished, and that if it was necessary for him to adequately prepare his arguments, he was certain that he could have requested and received a continuance. The entire meeting between Giddens and Henderson at the jail apparently lasted approximately thirty minutes.

Giddens did not recall reviewing any parts of the transcript of the penalty phase and did not "have an opinion" as to whether trial counsel had adequately presented mitigating circumstances to the jury. Giddens conceded that ineffective assistance of counsel may be a basis for reversing a conviction or death sentence even of a "guilty" individual. Giddens acknowledged that he never asked Henderson if he wanted to be executed. Giddens testified that, based on their brief interaction, he was confident that Henderson understood Alabama's capital murder sentencing scheme, the concept of mitigating circumstances, and the fact that the application of the death penalty requires more than the mere guilt as to the murder itself. Giddens testified that his role during the Rule 32 proceedings was to protect Henderson's rights, but stated that he was not required to dissuade Henderson from dismissing the petition. Giddens did concede that "legal issues should be ferreted out by the attorney." If Henderson had wanted him to go forward, Giddens said that he would have. Giddens testified that he never prompted Henderson to do anything.

Henderson was the only other person who testified at the evidentiary hearing. Henderson testified that he was not aware that he had been appointed Rule 32 counsel after his Maryland attorneys withdrew as counsel. When he was transported from prison to the Talladega County Jail in April of 1997 for the Rule 32 proceeding, he did not know the purpose of the trip. Then, when Henderson met Giddens, he told Giddens that he did not know "what all of the Rule 32 meant." Giddens told him that he was claiming ineffective assistance of counsel. Henderson told Giddens that he thought his trial attorneys "had done a good job with what they had to work with." Soon thereafter, according to Henderson, the two agreed that they would move to dismiss the Rule 32 petition the next day in open court. Henderson testified that if Giddens had told him that Giddens' brother second-chaired the prosecution and that the two brothers currently shared office space, he would have chosen not to go forward with Giddens as his counsel. He would have felt, if he had known this, that Giddens "would already have something against me from the get-go. It just wouldn't have felt right."

On cross-examination, Henderson acknowledged that, at the hearing that following day, Judge Fielding explained the consequences of withdrawing his Rule 32 petition. Also, Henderson conceded that, in his opinion, Giddens did not prompt him to dismiss his Rule 32 petition: "Prompt? I don't think he [Giddens] prompted me to. I think we settled our conversation and it basically come down to that's what I thought I wanted to do."

3. Habeas Petition Denied

On September 24, 2001, the magistrate judge filed a Report and Recommendation to deny Henderson's habeas petition. In this report, the magistrate judge determined that

each of the claims that were raised in the Rule 32 petition that Henderson dismissed prior to an adjudication on the merits were procedurally defaulted because Henderson had failed to properly exhaust his state remedies as to these claims, and now, by virtue of an independent state procedural bar, the claims could no longer be brought in state court.[13] As to the issue of whether there was sufficient "cause" to overcome this procedural default, the magistrate judge reached the following conclusion:

> [P]etitioner asserts that this waiver was not knowingly and intelligently made, even if voluntary. This argument is without merit. The record evidence is clear that petitioner knew he was giving up his right to a Rule 32 hearing. He may not have understood all of the issues that he was foregoing, but that is not necessary. What is important is that he understood that he was giving up whatever rights he had and that the result of that decision would hasten his execution. The purpose of the "knowing and voluntary" inquiry is to determine whether the defendant actually understands the significance and consequences of a particular

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[13] The magistrate judge also considered and rejected the several other claims for habeas relief raised in Henderson's § 2254 petition. Among these were fully exhausted claims that had not been procedurally defaulted. Considering these claims on the merits, the magistrate judge applied the standards set forth in 28 U.S.C. § 2254(d), and concluded that none of these particular claims had merit. The magistrate judge also explained that many of the other claims raised in Henderson's § 2254 petition were procedurally defaulted because they were never raised in the state courts on direct appeal or in the Rule 32 petition. Of course, these several other claims are not before us, as they were not included in the certificate of appealability.

> decision and whether the decision is uncoerced. Clearly, petitioner understood the significance of what he was doing and the consequences thereof.
>
> Furthermore, the undersigned magistrate judge concludes that petitioner's Rule 32 counsel, Mr. Steve Giddens, was unaware of his brother's prior involvement in the original prosecution of Henderson and . . . there is no evidence that he exerted any undue influence on petitioner for that or any other reason. In short, Mr. Giddens' relationship to a prosecutor in this case was not a factor in petitioner's decision to waive his Rule 32 proceedings.
>
> Consequently, the undersigned magistrate judge finds that petitioner has waived those issues raised in his Rule 32 petition because he dismissed that petition and cannot show cause and prejudice sufficient to overcome this procedural default.

Report and Recommendation at 50 (internal citations omitted).

On October 31, 2001, the district court adopted the recommendation of the magistrate judge and entered final judgment denying Henderson's federal habeas petition. In its final order, the district court indicated that it had carefully considered the magistrate judge's report and recommendation, as well as Henderson's objections, and found that only one claim carried any "weight." That claims was whether "Rule 32 counsel's relationship as the brother of the prosecutor who

played a minor role[14] in the trial resulted in a conflict of interest which in turn resulted in petitioner waiving the Rule 32 proceeding in a manner that was not knowing or voluntary." The district court explained that it was "unpersuaded that this argument is meritorious under the facts developed at the evidentiary hearing in this case and concurs with the Magistrate Judge's recommendation that this petition be denied."

4. Certificate of Appealability Granted in Part

Following the denial of his petition, Henderson moved in the district court for a certificate of appealability ("COA"). On January 29, 2002, the district court granted the COA as to Henderson's two arguments for cause:

> A certificate of appealability is GRANTED as to petitioner's claim that the waiver of his right to proceed under Alabama Rule 32 was not knowing, voluntary, intelligent and that petitioner was unduly influenced by an attorney with a conflict of interest, in that petitioner has made a substantial showing of the denial of a constitutional right. A certificate of appealability is DENIED as to all other claims raised by petitioner because he has not made a substantial showing of the denial of a constitutional right.

Henderson then moved this Court to expand the certificate and to stay the briefing schedule pending consideration of that motion. This Court granted the motion to stay the briefing

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[14] We note that we would not describe Rod Giddens' level of participation in the prosecution of Henderson as constituting a mere "minor role."

schedule and, in a later order, denied the motion for expansion of the certificate of appealability.

II. STANDARD OF REVIEW UNDER AEDPA

Title 28 U.S.C. § 2254 governs the authority of the federal courts to consider applications for writs of habeas corpus submitted by state prisoners. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which was effective as of April 24, 1996. AEDPA applies to all petitions filed after its effective date. Since Henderson filed this petition on April 11, 2000, AEDPA applies to this case.

AEDPA "places a new constraint on a federal habeas court's power to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court" by establishing a deferential standard for reviewing state court judgments in these cases. *Williams v. Taylor*, 529 U.S. 362, 412, 146 L. Ed. 2d 389, 120 S. Ct. 1495, 1523 (2000). Subsection (d) of § 2254 provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).[15]

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[15] In *Williams*, the Supreme Court addressed the meaning of these AEDPA provisions. In a previous case, we summarized the *Williams* holding, stating:

> The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions. A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case.
>
> A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from the Supreme Court case law to a new context. Notably, an "unreasonable application" is an "objectively unreasonable" application.
>
> Lastly, § 2254(d)(1) provides a measuring stick for federal habeas courts reviewing state court decisions. That measuring stick is "clearly established Federal law." 28 U.S.C. § 2254(d). Clearly established federal law is not the case law of the lower federal courts, including this

AEDPA also makes clear that substantial deference is to be accorded a state court's findings of fact. Section 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The district court's determination of whether this standard has been met is subject to de novo review. *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir. 2001), *cert. denied*, 535 U.S. 958, 122 S. Ct. 1367, 152 L. Ed. 2d 360 (2002). A district court's findings of fact are reviewed for

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Court. Instead, in the habeas context, clearly established federal law refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision.

Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001) (internal citations and quotations omitted). Also, "[i]n applying the 'contrary to' prong of § 2254(d), we have recognized that where no Supreme Court precedent is on point, we cannot say that the state court's conclusion . . . is contrary to clearly established Federal law as determined by the U.S. Supreme Court." *Isaacs v. Head*, 300 F.3d 1232, 1252 (11th Cir. 2002) (quoting *McIntyre v. Williams*, 216 F.3d 1254, 1258 (11th Cir. 2000)).

Thus, section 2254(d)(1), with its "contrary to" and "unreasonable application of" prongs, sets forth two narrow circumstances in which a federal court may grant a writ of habeas corpus to a state prisoner. Section 2254(d)(2) sets forth one more. This third and last situation is where the state court's conclusion is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

clear error. *DeLancy v. Florida Dept. of Corrections*, 246 F.3d 1328, 1329 (11th Cir. 2001). "Whether a particular claim is subjected to the doctrine of procedural default . . . is a mixed question of fact and law," subject to de novo review. *Judd v. Haley*, 250 F.3d 1308, 1313.

III. ISSUES PRESENTED

The district court granted a COA to review its conclusion that Henderson had not established cause to overcome the procedural default of the claims that he waived by dismissing his Rule 32 petition in the state court. In reaching this conclusion, the district court rejected the following two arguments for cause: (1) the waiver of his right to proceed under Alabama Rule 32 was not a "knowing, voluntary and intelligent" waiver because Henderson lacked a sufficient understanding of his legal rights and claims as set forth in the Rule 32 petition; and (2) the waiver was involuntary as the product of undue influence by Steve Giddens, an attorney with a conflict of interest.

IV. DISCUSSION

Each of the federal habeas claims that Henderson had initially raised in his Rule 32 petition, but later dismissed prior to an adjudication on the merits, are procedurally defaulted. "A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state courts." *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)). "The doctrine of procedural default was developed as a means of ensuring that federal habeas petitioners first seek relief in accordance with established state procedures." *Judd*, 250 F.3d at 1313. Since Henderson failed

to properly exhaust these claims in the state courts, and now is undeniably barred by firmly established and consistently applied state procedural rules from raising them,[16] the claims are procedurally defaulted, and our review is precluded by this adequate and independent state procedural ground.[17]

Henderson does not challenge the district court's conclusion that these claims have been procedurally defaulted. Acknowledging his state procedural default, Henderson argues that the procedural default should be excused, and that he should not be barred from pursuing these claims for the first time in this § 2254 federal habeas proceeding. Procedural default will be excused only in two narrow circumstances.

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[16] If Henderson now filed a Rule 32 petition asserting the same claims he initially raised in the Rule 32 petition that he dismissed, the new petition would be barred by multiple procedural rules, including the rule against successive petitions and the statute of limitations. See Ala.R.Crim.P. 32.2 (b) ("If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial...shall be treated as successive. . . . The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner."); Ala.R.Crim.P. 32.2(c) ("[T]he court shall not entertain any [Rule 32] petition for relief from a conviction or sentence . . . unless the petition is filed . . . within one (1) year after the issuance of the . . . judgment of the Court of Criminal Appeals [disposing of the direct appeal].").

[17] *See Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998) ("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief.").

First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *See Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639, 2644, 91 L. Ed. 2d 397 (1986); *Sykes*, 433 U.S. at 87, 97 S. Ct. at 2506. "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To establish "prejudice," a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. *Id.*; *Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002). Second, a federal court may also grant a habeas petition on a procedurally defaulted claim, without a showing of cause or prejudice, to correct a fundamental miscarriage of justice. *Murray*, 477 U.S. at 495-96, 106 S. Ct. at 2649. A "fundamental miscarriage of justice" occurs in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent. Id.

Henderson attempts to overcome the procedural default in this case by establishing "cause and prejudice."[18] While constitutionally ineffective assistance of counsel has been considered cause to excuse a procedural default that occurs at a stage in the proceedings in which the defendant enjoys a

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[18] While alternatively suggesting in his brief that his execution would result in a "fundamental miscarriage of justice," Henderson has not attempted to offer any evidence to even suggest that he might be actually innocent of the underlying offense, and therefore has made no substantial argument under the fundamental miscarriage of justice exception to the doctrine of procedural default.

Sixth Amendment right to the effective assistance of counsel, there is no constitutional right to an attorney in state post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991). "Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Id.* Therefore, any ineffectiveness of Steve Giddens could not be considered cause for the purposes of excusing the procedural default that occurred in this case at the state collateral post-conviction level. *Id.*; *In re Magwood*, 113 F.3d 1544, 1551 (11th Cir. 1997); *Johnson v. Singletary*, 938 F.2d 1166, 1174-75 (11th Cir. 1991). With AEDPA, Congress codified this rule by enacting § 2254(i), which provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

Recognizing that he has no argument for cause based on any purported ineffectiveness of Giddens in the Rule 32 proceedings, Henderson presented two alternative arguments for cause, a "lack of understanding" argument and an "undue influence" argument. See supra at [M/S 21] (Section III. "Issues Presented"). As stated above, the district court rejected these two arguments for cause, but granted Henderson's request for a COA allowing him to seek review from this Court. We now address Henderson's two arguments for cause, conclude that Henderson has not shown cause on either ground, and affirm the district court's denial of habeas relief.

A. Lack of Understanding

Henderson's first argument for cause is based on his alleged lack of a sufficient understanding of the actual claims contained in the Rule 32 petition he dismissed. Henderson

argues that because of this failure, his dismissal was not a "knowing, voluntary, and intelligent" waiver of his legal rights. Henderson argues that under prevailing law, his waiver is ineffective unless it was "an intentional relinquishment or abandonment of a known right or privilege," and, according to Henderson, his was not. Thus, he argues that this court should find cause and excuse the procedural default created by the premature dismissal of his Rule 32 claims.

Henderson's argument that he lacked a sufficient understanding of the claims set forth in the Rule 32 petition that he dismissed is more specifically confined to the "knowing and intelligent" prongs of the "knowing, voluntary, and intelligent" standard that he sets forth. With respect to his "lack of understanding" argument for cause, the argument Henderson presents is not one of lack of "voluntariness." [19] Rather, the argument focuses specifically on whether Henderson's alleged lack of understanding of the legal claims set forth in his Rule 32 petition rendered his decision to dismiss the petition not sufficiently "knowing and intelligent" to be deemed legally valid. We now turn to this question, while fully recognizing the AEDPA-mandated deference owed to the prior determination of the Alabama Court of Criminal Appeals as to this same issue in *Henderson v. State*, 733 So.2d 484 (Ala.Crim.App. 1998).[20]

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[19] Voluntariness is the focus of Henderson's second argument for cause, discussed in the next section, that his dismissal was the product of the undue influence of Steve Giddens.

[20] *See supra* at [M/S 3-7] (discussing the state court's determination on this issue).

Language from the Supreme Court's decision in *Rees v. Peyton*, 384 U.S. 312, 86 S. Ct. 1505, 16 L. Ed. 2d 583 (1966), has consistently been cited as setting forth the controlling legal standard for assessing the validity of a death row inmate's choice to forego post-conviction review. In *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir. 1992), this Circuit addressed the question of whether Lonchar was competent to waive his right to collaterally challenge his conviction and death sentence. Quoting from Rees, this Court phrased the test as follows:

> Competency to forego further legal proceedings depends on whether the person whose competency is in question "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

Lonchar, 978 F.2d at 641 (*Rees*, 384 U.S. at 314, 86 S. Ct. at 1506). Applying this Rees test in *Lonchar*, this Circuit affirmed the district court and held that the condemned person could forego further review of his conviction and sentence. *Id.* at 642. This Court noted that the district court had "found that Lonchar was able to understand his legal position and the options available to him" and "the consequences of not pursuing review of his conviction." *Id.* It concluded that "Lonchar could make a rational choice among his options," and according to testimony from a psychiatrist, after "considering his options and the quality of life in prison, [Lonchar] had decided not to oppose his conviction." *Id.*

Then, in *Ford v. Haley*, 195 F.3d 603, 605 (11th Cir. 1999), our Circuit considered another case where a death row

inmate sought to dismiss his counsel and forego all further collateral challenges to his conviction and sentence. The district court found the inmate competent to forego further collateral relief. In so concluding, "[t]he district court held that under Lonchar, Ford need not understand the particulars of each legal issue framed in the petition or the likelihood of prevailing on any or all of them, as his counsel argues." *Id.* at 615. Rather, Ford needed to exhibit "a basic understanding of the habeas proceedings" and understand "that without further proceedings he would be executed." *Id.* He needed to understand "the 'bottom line' of his legal situation - that he must continue to engage in the review process or be executed -[in order to be] able to make a rational choice among these options." Id. Upon review, this Circuit upheld the decision of the district court. In so doing, this Circuit stated that "[t]he district court applied the Rees test in the precise manner instructed in Lonchar." *Id.* at 617.

In *Hauser ex. rel. Crawford v. Moore*, 223 F.3d 1316 (11th Cir. 2000), a death row inmate "filed a waiver of all collateral and/or post-conviction relief proceedings." *Id.* at 1319. The state court appointed an attorney to represent the inmate. *Id.* The inmate filed a motion to dismiss the counsel and for permission to proceed pro se. *Id.* Despite the inmate's desire to proceed pro se and waive all rights to collaterally challenge his death sentence, attorneys from the Capital Collateral Regional Counsel ("CCRC") and Hauser's biological mother, purporting to act on Hauser's behalf, attempted to challenge the conviction and sentence in both state and federal court. *Id.* at 1319-20. On appeal from a § 2254 petition filed by CCRC, this Circuit concluded that the inmate was competent to dismiss the § 2254 petition. *Id.* at 1322-23.

Relying on the Circuit's prior precedent in *Ford* and *Lonchar* to articulate the proper test, the panel in *Hauser* addressed whether the inmate "understood the '*bottom line' of his legal situation* - that he must continue to engage in the review process or be executed - and that he was able to make a rational choice among these options." *Id.* at 1323 (emphasis added). Then, the court acknowledged that the state court had previously concluded that the inmate "has the capacity to appreciate the allegations against him, has an appreciation for the range and nature of these proceedings and the appellate process, and has the ability to disclose facts pertinent to those proceedings." *Id.* The panel then noted that these findings are entitled to a presumption of correctness that can only be rebutted by clear and convincing evidence that the inmate is incompetent. The court easily found such evidence lacking and vacated the stay consistent with the inmate's expressed wishes. *Id.*

Applying the standard derived from the foregoing cases, we readily conclude that the state court's determination, see *Henderson v. State*, 733 So. 2d 484 (Ala.Crim.App. 1998), in this case was not "contrary to, or [did not] involve an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1). Nor did the state court's determination result "in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." *See* 28 U.S.C. § 2254(d)(2). The record in this case, including the extensive colloquy conducted by the Rule 32 court prior to its granting of Henderson's motion to dismiss, see supra at [M/S 4-7], makes clear that Henderson understood the "bottom line" of his legal situation, that he had to continue to engage in the collateral review process or be executed, and that he was able to make a rational choice among these options. The colloquy also makes it clear that

Henderson had a basic understanding of the purpose of the Rule 32 proceedings which he was deciding to abort, namely an effort to get a new trial. Thus, the district court correctly concluded that this "lack of understanding" argument for cause is without merit.[21]

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[21] Henderson's brief on appeal makes a conclusory argument that the foregoing cases are applicable only in situations where the petitioner's mental competence is challenged, and should not apply in the instant situation. Henderson vaguely suggests that the *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938), "knowing, voluntary and intelligent" standard is a different standard and that it should apply. Not only is Henderson's suggestion in this regard vague and brief, it is entirely lacking in any specification of the factual basis for his "knowing and intelligent" claim. However, it is clear from the entire litigation that the gist of Henderson's claim is that Giddens failed to explain to him the particulars of the legal issues framed in the Rule 32 petition to be aborted, so that he lacked a full understanding of the actual claims. Having identified the factual basis of Henderson's claim, it is readily apparent that it is wholly without merit. This court in Ford expressly held, in the same context of waiving further collateral challenges, that the petitioner "need not understand the particulars of each legal issue framed into the petition or the likelihood of prevailing on any or all of them." 195 F.3d at 619. Accordingly, we have no need in this case to decide whether some other case involving different facts might make it appropriate to apply some variation of the standard derived above from Rees, Lonchar, Ford, and Hauser.

Because we reject Henderson's lack of understanding claim on the foregoing grounds, we need not address whether his claim is the functional equivalent of an ineffective assistance of counsel claim and therefore barred because Henderson has no constitutional right to effective assistance of counsel in state collateral proceedings.

B. Undue Influence

Henderson's second argument for cause is that his decision to dismiss his Rule 32 petition was not made voluntarily because it was the result of the undue influence of Steve Giddens, his Rule 32 counsel. This argument is based on the evidence presented at the evidentiary hearing in the district court including evidence that Giddens' brother second-chaired Henderson's 1988 trial, and that Giddens' friend Billy Haney, a local law enforcement officer in Talladega, was the brother of the victim of the murder committed by Henderson. The district court considered the testimony of Giddens and Henderson, and concluded that Giddens' relationships were "not a factor" in Henderson's decision to waive his Rule 32 proceedings. Henderson argues that this Court should reject the district court's determination that he was not unduly influenced by Giddens to dismiss his Rule 32 petition.

There is a threshold procedural issue that precedes any consideration of the merits of Henderson's argument that he was unduly influenced by Giddens. Respondents argue that this argument was not properly exhausted in the state courts, has been procedurally defaulted, and therefore is now barred and should not be considered by this Court. It is undisputed that Henderson did not present this claim of undue influence at any point in the state court Rule 32 proceedings. Rather, for the first time in his § 2254 pleadings in federal habeas court, Henderson has raised the fact that Steve Giddens was the brother of one of his prosecutors and the long-time friend of the victim's brother and argued that Giddens unduly influenced him to dismiss his Rule 32 petition. Consequently, the state court never had the opportunity to consider whether the validity of Henderson's dismissal of his Rule 32 petition was compromised by his counsel's actions and these potentially conflicting relationships.

A state prisoner is ordinarily not able to obtain a writ of habeas corpus from a federal court unless he has exhausted the remedies available in the courts of the state. A claim is procedurally defaulted for the purposes of federal habeas review where "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 2557 n.1, 115 L. Ed. 2d 640 (1991). Therefore, given the facts of this case, before we consider whether Henderson's undue influence argument provides cause to excuse the procedural default of his ineffective assistance claims, we must first determine whether this argument for cause can even be considered or whether it has itself been procedurally defaulted by Henderson's failure to present it to the state court in the manner required by state procedural rules.

In this case, the issue is not whether an actual constitutional claim being asserted as a basis for habeas relief is procedurally defaulted. Rather, we consider whether an argument for cause to excuse a procedural default of a constitutional claim is procedurally defaulted in its own right. Because this would involve a double-layered application of the exhaustion and procedural default rules, we must first address whether these rules are even applicable in these circumstances to potentially bar Henderson from raising the undue influence argument as cause to excuse the procedural default of the constitutional claims asserted in the Rule 32 petition he dismissed.

While there are very few record cases involving a double-layered application of the doctrine of procedural default, the Supreme Court fairly recently made clear that an ineffective assistance of counsel claim being used for cause to excuse a

procedural default of another claim is not itself excepted from the doctrine of procedural default. In *Edwards v. Carpenter*, 529 U.S. 446, 451-52, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518 (2000), a habeas petitioner argued ineffective assistance of counsel as cause for his procedural default of other constitutional claims in his § 2254 petition. But, he had never raised this ineffective assistance claim in state court, and he was now procedurally barred from raising the claim. The Supreme Court held that unless the petitioner could establish cause and prejudice to excuse his procedural default of his ineffective assistance claim, he was barred from using it as a basis for cause to excuse his procedural default of the underlying claim. *Id.* at 451-53, 120 S. Ct. at 1593-94.[22]

With its decisions in *Edwards v. Carpenter* and *Murray v. Carrier*, *see supra* n.22, the Supreme Court has made clear that a procedurally defaulted ineffective assistance of counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective assistance claim itself. While the present case does

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[22] Edwards was not the first Supreme Court decision to address a situation involving the attempted use of an unexhausted claim as cause to excuse a procedural default. In *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), the Supreme Court reasoned that a prisoner must be required to present his claim of ineffective assistance of counsel to the state courts as an independent claim before he may use it to establish cause to excuse the procedural default of another claim. *Id.* at 488-89, 106 S. Ct. at 2646. But it was not until Edwards that the Supreme Court made it clear that the failure to properly exhaust the ineffective assistance of counsel claim actually resulted in a procedural default of the claim being asserted as cause, completely barring that claim from being used to excuse the procedural default of the underlying claim.

not involve the attempted use of ineffective assistance of counsel as cause, we believe the rule set forth in *Edwards* applies to Henderson's argument for cause based on undue influence.

We believe this is an obvious and natural extension of *Edwards* and *Murray*, as all of the same reasons for applying the exhaustion and procedural default rules in Edwards and Murray apply equally here.[23] No less than when the argument for cause is a procedurally defaulted ineffective assistance of counsel claim, allowing a procedurally defaulted undue influence argument to be presented as cause in this case would allow a federal district court to take steps toward upsetting a state court conviction without giving the state courts an opportunity to address those claims in the first instance. *Edwards*, 529 U.S. at 451, 120 S. Ct. at 1591; *Murray*, 477 U.S. at 489, 106 S. Ct. at 2646. The very principles of comity and federalism that underlie the exhaustion doctrine are equally undermined regardless of whether the procedurally defaulted claim is asserted as cause for a procedural default or

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[23] Moreover, any other rule would not only permit the "cause claim" to escape the exhaustion and procedural default rules, but would also permit escape from the deference to state court rulings mandated by AEDPA, as there would be no state court ruling to which deference could be afforded. This escape would be permitted, while at the same time, other claims for cause presented to the state courts, like Henderson's lack of understanding argument, would be subjected to AEDPA's deferential standard of review. It would be completely anomalous for us to allow a claim for cause, never raised in the state courts, to occupy a much more favorable position in federal habeas court than a claim for cause that has actually been presented to the state courts.

is denominated as an independent ground for habeas relief. *Murray*, 477 U.S. at 489, 106 S. Ct. at 2646.[24]

Thus, we hold that Henderson's undue influence claim is subject to the exhaustion requirement and doctrine of procedural default. Concluding that both of these rules apply, we will consider whether the rules were satisfied in this case. It is undisputed that Henderson has never argued, at any level of his Rule 32 proceedings in the Alabama state courts, that his Rule 32 dismissal was involuntary as the product of the undue influence of Rule 32 counsel. Rather, this argument for cause was raised for the first time in the district court § 2254 proceedings below. The exhaustion requirement, grounded in principles of comity and federalism, requires a habeas petitioner to first present his claims to the state courts before seeking relief in the federal courts under 28 U.S.C. § 2254. Section 2254(b)(1)(A) provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--the applicant has exhausted the remedies available in the courts of the State."[25]

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[24] As with Henderson's lack of understanding claim, Henderson's undue influence claim seems to be merely a variation of a common ineffective assistance of counsel claim, this time grounded in counsel's alleged conflict of interest. In light of our resolution of this case on other grounds, we need not address whether Henderson's claim is the functional equivalent of an ineffective assistance of counsel claim and therefore barred because Henderson has no right to effective assistance of counsel in state collateral proceedings.

[25] In order to establish proper exhaustion of state court remedies, a petitioner must have "fairly presented" the substance of his federal claims to the state courts by raising both the factual and legal premises of the claims for relief that are now being

In this case, Henderson prosecuted an appeal of his dismissal of his Rule 32 petition. In that appeal, with the assistance of current counsel, he sought to have his Rule 32 dismissal vacated, thus reinstating his Rule 32 petition. As grounds for the relief he sought, Henderson argued that he lacked a sufficient understanding of his claims and legal rights to have made a legally valid "knowing, voluntary, and intelligent" waiver of rights. Instead of seeking relief only on this ground, Henderson could have also pressed his alternative argument that his dismissal was involuntary and should be set aside because it was the product of the undue influence of

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asserted in the federal habeas proceeding. The state court must have been given a fair opportunity to apply controlling legal principles to the facts bearing upon the claim now being raised. *See Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865 (1995); *Anderson v. Harless*, 459 U.S. 4, 6-8, 103 S. Ct. 276, 277-78, 74 L. Ed. 2d 3 (1982); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S. Ct. 509, 512-13, 30 L. Ed. 2d 438 (1971). Thus, the "lack of understanding" claim raised by Henderson in the state court will not serve to satisfy the exhaustion requirement as to his "undue influence" claim, even if that is arguably a variation of the same "knowing, voluntary, and intelligent" argument. The lack of understanding claim did not involve any of the current allegations of undue influence and conflict of interest of Henderson's Rule 32 counsel. The undue influence claim relies upon facts and legal arguments never presented to the state court. That the lack of understanding claim was presented to the state court under the same general legal umbrella but with entirely different factual underpinnings does not constitute fair presentation of the undue influence claim. Both the legal theory and the facts on which the federal claim rests must be substantially the same for it to be the substantial equivalent of the properly exhausted claim. The undue influence claim clearly does not meet this standard. Thus, any suggestion that Henderson has properly exhausted the undue influence claim by exhausting his lack of understanding claim in the state court is without merit.

Steve Giddens. Additionally, Henderson likely could have sought post-judgment relief in the Rule 32 trial court, such as by filing a motion for new trial brought pursuant to Ala.R.Crim.P. 24.1, and stating as grounds that Giddens' alleged actions deprived him of a "fair and impartial [Rule 32] trial." *See* Ala.R.Crim.P. 24.1(c)(2) (setting forth the grounds by which a motion for new trial can be granted). *See also* Ala.R.Crim.P. 32.4 (stating that Rule 32 proceedings are "governed by the Rules of Criminal Procedure,"[26] and explaining that post-trial motions under Ala.R.Crim.P 24, including motions for new trial, can be sought from a Rule 32 judgment). A motion for new trial under Rule 24.1 and an appeal from the Rule 32 dismissal to the Alabama Court of Criminal Appeals clearly provided Henderson with a well-established procedure under state law by which he could have raised the issue of the alleged undue influence of Steve Giddens in this case. Thus, because Henderson failed to give the state courts one full opportunity to resolve Henderson's claim by invoking one complete round of Alabama's well established appellate review process, we conclude that he has failed to satisfy the exhaustion requirement as to the undue influence claim. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1 (1999).

A claim is procedurally defaulted for the purposes of federal habeas review where "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct.

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[26] This is opposite to our federal practice, where petitions for writs of habeas corpus are governed by the rules applicable in civil cases.

2546, 2557 n.1, 115 L. Ed. 2d 640 (1991). If Henderson were to now raise this undue influence issue in an effort to set aside his Rule 32 dismissal in the Alabama courts, it would be rejected on firmly established and consistently applied procedural grounds. If brought as a motion for new trial under Rule 24.1, it would be barred as untimely, as motions for new trial must be brought within 30 days of judgment. Ala.R.Crim.P. 24.1(b). Alternatively, if brought as part of a new Rule 32 petition asserting the Rule 32 claims anew, it would be either barred by the statute of limitations, Ala.R.Crim.P. 32.2(c) (one year after judgment on direct appeal), or rejected as a successive petition under Ala.R.Crim.P. 32.2(b).[27]

Even though we conclude that Henderson has procedurally defaulted his undue influence argument for cause, our inquiry does not end there. "To hold, as we do, than [Henderson's undue influence] claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim." *Edwards*, 529 U.S. at 453, 120 S. Ct. at 1592. However, the undisputed facts of this case provide Henderson with no such argument for cause to

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[27] Henderson has presented no argument to the contrary. In fact, Henderson filed a second Rule 32 petition in the Talladega County Circuit Court after his unsuccessful appeals in the original Rule 32 proceedings, but prior to filing this federal habeas petition. This second Rule 32 petition was dismissed pursuant to Ala.R.Crim.P 32.2(b) and (c). Apparently, Henderson did not appeal that disposition. This court is aware of no reason why any attempt by Henderson to raise a new argument of undue influence in the state courts in a belated effort to set aside his original Rule 32 dismissal would not face this same procedural fate.

excuse his failure to properly exhaust his undue influence claim in state court.

Steve Giddens' representation of Henderson ceased on the date of Henderson's dismissal of his Rule 32 petition, and no further communications occurred between these two individuals. Thus, any alleged undue influence ceased long before Henderson's Rule 32 proceeding made its way completely through the Alabama state courts. The Equal Justice Initiative timely filed a notice of appeal from the Rule 32 dismissal, and Henderson's current counsel prosecuted the merits of the appeal in the Alabama Court of Criminal Appeals. Nevertheless, no undue influence argument was presented. No claim has been made that Henderson or his counsel were ever denied any documents containing information regarding Henderson's capital trial and its participants and witnesses, including the trial transcripts. Not only is a plausible argument for cause not discernable by this Court upon its independent review of this record, Henderson has not advanced any argument of his own that his failure to raise the undue influence issue in the state court following the Rule 32 dismissal should be excused by this Court, and has presented no facts to this Court that could reasonably serve as a basis for excusing such failure.

Because Henderson had an opportunity to raise this undue influence issue in either a post-judgment motion in the Rule 32 court or in his Rule 32 appeal to the Alabama Court of Criminal Appeals, or both, and because he has presented nothing to suggest that he was impeded in anyway from raising this argument, we agree with Respondents that this failure has resulted in an additional layer of procedural default for which no cause has been shown to excuse. As a result, Henderson's undue influence argument is itself procedurally defaulted without excuse, and therefore cannot be considered

as cause to potentially excuse his procedural default of the claims he dismissed in his Rule 32 petition.

Even if it was not procedurally barred, we would still reject Henderson's undue influence claim on the merits. The magistrate judge held an evidentiary hearing in this case to determine whether Henderson's decision to dismiss his Rule 32 petition was involuntary as the product of the undue influence of Steve Giddens. After hearing substantial testimony from both Giddens and Henderson, and considering the arguments of counsel, the magistrate judge made factual findings that Giddens was unaware, during his representation of Henderson, that his brother had participated in Henderson's prosecution, and that Giddens in no way exerted any undue influence on Henderson for that or any other reason. Put another way, the magistrate judge expressly found that Giddens' relationship to his brother was not a factor in Henderson's decision to dismiss his Rule 32 petition. This finding of fact has ample support in the record. Henderson's own testimony at the evidentiary hearing supports the magistrate judge's finding. Asked by his own counsel on direct examination whether he was prompted by Giddens to dismiss his Rule 32 petition, Henderson responded as follows: "Prompt? I don't think he prompted me. I think we settled our conversation and it basically came down to that's what I thought I wanted to do." From this testimony and from the testimony of Giddens, the district court found that Henderson was not unduly influenced into dismissing his Rule 32 petition. We conclude that this finding is not clearly erroneous. Thus, Henderson's "undue influence" claim also fails on the merits.[28]

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[28] In rejecting Henderson's undue influence claim, we also reject Henderson's argument that undue influence should be presumed. Assuming arguendo, but not deciding, that such a

V. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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presumption theory might operate under some circumstances, and that the contours of such a theory would be as articulated by Henderson in his brief, we still would conclude that Henderson has failed to satisfy the test he proposes. Relying upon Alabama undue influence law applied in will contests as set forth in the case of *Burns v. Marshall*, 767 So. 2d 347, 352 (Ala. 2000), Henderson argues that undue influence is presumed when: (1) there is a confidential relationship; (2) there is a dominant and controlling influence by the fiduciary; and (3) there is "undue activity" in procuring the action at issue. In the instant case, the magistrate judge found that Giddens exerted no undue influence on Henderson's decision because of the alleged conflicts or for any other reason. Thus, Henderson cannot satisfy the third prong of his own suggested test.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CIVIL ACTION NO. CV-00-BU-0941-E

[Entered October 31, 2001]

JERRY PAUL HENDERSON,)
Plaintiff,)
)
vs.)
)
RON E. JONES, Commissioner of)
the Alabama Department of)
Corrections and the ATTORNEY)
GENERAL OF THE STATE OF)
ALABAMA,)
Respondents.)

FINAL JUDGMENT

On September 25, 2001 the Magistrate Judge's report and recommendation was entered and the parties were allowed therein fifteen (15) days in which to file objections to the recommendations made by the Magistrate Judge. On October 10, 2001, petitioner filed objections to the Magistrate Judge's report and recommendation.

The Court has carefully considered the record in this case, the Magistrate Judge's report and recommendation and the petitioner's objections thereto. Obviously, some arguments deserve more attention than others. Only one carries any weight, however: that the Rule 32 counsel's relationship as the brother of the prosecutor who played a minor role in the trial resulted in a conflict of interest which in turn resulted in petitioner waiving the Rule 32 proceeding in a manner that was not knowing or voluntary. The District Judge is unpersuaded that this argument is meritorious under the facts developed at the evidentiary hearing in this case and concurs with the Magistrate Judge's recommendation that this petition be denied.

Accordingly the Court hereby ADOPTS the report of the Magistrate Judge. The Court further ACCEPTS the recommendations of the Magistrate Judge.

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus in this action be and the same hereby is DENIED.

IT IS SO ORDERED this 30th day of October, 2001.

/s/
H. DEAN BUTTRAM, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASE NO. CV00-BU-0941-E

[Filed September 24, 2001]

JERRY PAUL HENDERSON, Petitioner	)
vs.	)
RON E. JONES, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents	)

REPORT AND RECOMMENDATION

Petitioner, Jerry Paul Henderson, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges the validity of his 1988 conviction in the Circuit Court of Talladega County for capital murder and sentence of death by electrocution.

PROCEDURAL BACKGROUND

Petitioner was indicted by the September Term 1987 Grand Jury of Talladega County, Alabama, on two counts of capital murder. Count One charged Henderson with killing Jerry Haney in exchange for receiving $3,000.00 from Judy Haney, Jerry Haney's wife and Henderson's sister-in-law, in violation of § 13A-5-40(7), *Alabama Code*. Count Two charged Henderson with the murder of Jerry Haney while robbing him of $80.00, in violation of § 13A-5-40(2), *Alabama Code*. He was convicted by a jury on both charges. CR. 53.[1]

A sentencing hearing was held immediately following the verdict. The jury recommended, by a vote of 10 to 2, that Henderson be sentenced to death. CR. 54. Thereafter, a final sentencing hearing was held before the trial Judge, Jerry L. Fielding. Judge Fielding sentenced Henderson to death, CR. 80, and issued a written sentencing order outlining the reasons for this sentence. CR. 72-81.

Petitioner's conviction was appealed to the Alabama Court of Criminal Appeals, which affirmed the conviction and sentence of death. *Henderson v. State*, 583 So.2d 276 (Ala.Crim.App. 1990). This decision was affirmed by the Alabama Supreme Court. *Ex parte Henderson,* 583 So.2d 305 (Ala. 1991). A petition to the United States Supreme Court for a writ of certiorari to the Alabama Supreme Court was denied. *Henderson v. Alabama*, 3 U.S. 908, 112 S.C. 1268, 117 LED.2d 496 (1992).

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[1] "CR " is a reference to the paginated record of the clerk of court found in the first volume of the trial transcript. "TR." is a reference to the trial transcript itself. "R32." is a reference to the one-volume transcript of the Rule 32 proceedings.

On October 13, 1993, petitioner, represented by new counsel, Mr. Jack John, filed a petition for relief from judgment pursuant to Rule 32, Ala.R.Crim.P. R32.4-25. Mr. John withdrew on April 5, 1994. The trial court appointed new counsel, Mr. Steve Giddens, to represent Henderson on the Rule 32 petition on July 30, 1996.

A hearing on the Rule 32 petition was scheduled for April 22, 1997. However, on that date Henderson appeared with his court-appointed counsel and withdrew his petition. This withdrawal was finalized in an order by the trial judge issued May 29, 1997.

On July 10, 1997, a newly-retained attorney filed a notice of appeal of the trial court's dismissal of the Rule 32 petition. The dismissal was affirmed by the Alabama Court of Criminal Appeals. *Henderson v. State*, 733 So.2d 484 (Ala.Crim.App. 1998). Reheating was overruled on October 2, 1998. The Alabama Supreme Court initially granted Henderson's petition for a writ of certiorari. However, that court reconsidered and quashed the writ. No. 1980085 (Ala. filed April 23, 1999).

On October 27, 1999, Henderson filed a second Rule 32 petition in Talladega County Circuit Court, which the court dismissed on December 7, 1999, pursuant to Rule 32.2(b) and (c) of the Alabama Rules of Criminal Procedure.

The instant habeas corpus petition was filed on April 11, 2000, less than one year after the order of the Alabama Supreme Court quashing certiorari in the initial Rule 32 petition.

FACTUAL BACKGROUND

The testimony at Henderson's trial is not in dispute and is set out below as summarized by the Alabama Court of Criminal Appeals.

> The evidence tended to show that late in December 1983, Judy Haney and her children fled their home in Talladega County, Alabama (allegedly to escape the abusive environment that her husband, Jerry Haney, had created). Mrs. Haney and her children went to stay at the home of Jerry and Martha Henderson in Calhoun, Georgia. Martha Henderson and Judy Haney are sisters.
>
> Shortly after Mrs. Haney's arrival in Georgia, she and the appellant began discussing a plan pursuant to which Mrs. Haney would pay the appellant $3,000 in exchange for the murder of her husband. The appellant agreed to the proposed scheme. It was decided that Mr. Haney would be murdered on January 1, 1984.
>
> On New Year's Day, the appellant went to the home of Michael Wayne Wright, an old friend and hunting partner. The appellant asked Mr. Wright if he had any shotgun shells he could give the appellant. Mr. Wright replied that he did not, but that his friend Robert Lewis probably did. They went to the home of Mr. Lewis, and his wife Wanda gave them the requested shotgun shells.
>
> Later that night, the appellant and his wife were entertaining friends. The appellant complained of having the flu and retired to his bedroom. Once there,

he turned out the light and let himself out of the window. He then got into his pickup truck and drove to Alabama.

Following Mrs. Haney's directions, the appellant parked his truck in a wooded area adjacent to the Haney home. The appellant then walked through the woods and up. to the front door of the house. He put his loaded shotgun down on the porch and knocked on the door. Mr. Haney, who was in bed, heard the knocking and went to the door. The appellant told Mr. Haney that he had brought Mrs. Haney and the children back to Alabama, but that the truck had run out of gas and they were sitting on the side of the road. Mr. Haney agreed to help the appellant get some gas.

Mr. Haney changed his clothes and came outside, locking the front door behind him. At this time, the appellant fired the first shot at his victim, hitting him in the chest. The blast knocked Mr. Haney to the ground and while he was on the ground, the appellant shot him again, this time grazing his ear. After this shot, the victim got to his feet and ran around to the back of his house, collapsing on the back porch steps and begging for his life. The appellant placed the shotgun on Mr. Haney's bottom lip and fired the last shot.

The appellant then rolled the victim onto his stomach and took his wallet out of his back pocket. On the way back to his pickup truck, he broke the light on the front porch. At approximately 11:00p.m., the appellant stopped in Oxford, Alabama and called his

wife and Mrs. Haney from a Waffle House restaurant to tell them that Mr. Haney was dead.

When the appellant arrived back home, he took the money, approximately $100, out of the wallet and Mrs. Haney took the victim's Social Security card. Mrs. Haney paid the appellant about $30 for his expenses on the trip and kept the remainder of the cash. The wallet was later destroyed. The shotgun was thrown into the river and was never recovered.

On January 2, 1984, Mrs. Haney contacted Lieutenant Billy Haney of the Talladega Police Department, the brother of Jerry Haney, the victim. Mrs. Haney requested that Lieutenant Haney go check on her husband because she had been trying to call him, but had been unable to get an answer. Lieutenant Haney went to the residence, where he discovered the body of his brother.

Jerry Wayne Haney's corpse was taken to the Department of Forensic Sciences for an autopsy. He had one shotgun wound to his left lower arm which penetrated the arm and entered his left chest. There was also a wound which grazed the victim's left ear. Finally, there was one shotgun wound to Haney's mouth which caused the mouth to be torn at the corners. This wound fractured almost every bone in the victim's skull, fractured the first two cervical vertebrae, and drove a tooth into Haney's spinal cord. It was this gunshot wound to the mouth that killed Jerry Haney.

When the investigation of the murder of Jerry Haney officially commenced, Jerry Henderson was the key

suspect. On January 30, 1984, he reported to the police that his pickup truck had been broken into and his shotgun had been stolen. However, the circumstances surrounding the alleged theft were very suspicious.

For the next three years, the authorities searched for clues in the murder case of Jerry Wayne Haney. Finally, in the fall of 1987, Martha Henderson agreed to turn State's evidence. On September 9, 1987, law enforcement officials placed a "nagra unit" in the back seat of Mrs. Henderson's car to tape record conversations between her and her husband, the appellant. That night, Mr. and Mrs. Henderson got together and talked about the murder while sitting in Mrs. Henderson's car. The police got every word on tape.

On September 12, 1987, the appellant was arrested in Rome, Georgia, for the capital murder of Jerry Wayne Haney. Very early the next morning, the appellant confessed to the murder at the Floyd County jail in Georgia, and his confession was tape recorded.

Henderson v. State, 583 So.2d at 280-81.

ISSUES RAISED IN § 2254 PETITION

Petitioner has asserted numerous issues which are summarized as follows. Petitioner alleges:

A. He was denied his rights under the United States Constitution[2] by the prosecutor's use of peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.C. 1712, 90 L.Ed.2d 69 (1986) (Batson violation);

B. He was denied his constitutional rights by the trial court's denial of his motion for individual voir dire of the prospective jurors;

C. He was denied his constitutional rights by the trial court's denial of his motion for a change of venue;

D. Execution in Alabama's electric chair is cruel and unusual punishment in violation of his constitutional rights;

E. His constitutional rights were violated by the trial court's refusal to propound "reverse-*Witherspoon*" questions to the jury;

F. Prosecutorial misconduct deprived him of a fair trial, including:

(I) *Batson* violations;

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[2] The constitutional rights alleged to have been abridged are set out in detail in Henderson's petition and, in the interest of brevity, will not be set out here. However, they will be set out during the discussion of each of these issues below.

(II) withholding impeaching information[3] in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.C. 1194, 10 L.Ed.2d 215. (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.C. 763, 31 L.Ed.2d 104 (1972);

(III) prejudicing petitioner by improperly seating the brother of the victim at the prosecutor's table in the courtroom during the trial and by asserting that he (the prosecutor) represented the family of the decedent at these proceedings;

(IV) improperly arguing that there was no evidence of self defense though the defendant had promised to present such evidence;

(V) improperly appealing to the suffering of the victim's family and improperly arguing the jury should leave out sympathy while deliberating petitioner's sentence;

(VI) Improperly arguing that each juror had pledged to vote for the death penalty in this case; and,

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[3] Petitioner alleges that the prosecutor failed to disclose a promise or benefit bestowed on government witness Mary Henderson that, in return for her cooperation, she would never be prosecuted by the State of Alabama. No other *Brady* or *Giglio* violations are specified in Henderson's petition.

(VII) improperly suggesting that, because there are only 14 defined capital crimes in Alabama, jurors should more readily sentence petitioner to death because he committed two of them;

G. The trial court improperly allowed the jurors to consider whether the death of the victim was especially heinous, atrocious, and cruel, in violation of Henderson's constitutional rights;

H. The trial court improperly instructed the jury on the crime of murder during robbery such that it rendered the use of this aggravating factor overbroad and denied petitioner his right to due process under the United States Constitution;

I. The trial court's instruction on "reasonable doubt" violated due process by requiring a higher degree of doubt than is required for acquittal under the law;[4]

J. The trial court issued an improperly suggestive explanation of the jury verdict form;

K. The trial court improperly considered the pre-sentence report which was withheld from the petitioner until the last minute, in violation of his constitutional rights;

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[4] This instruction required proof beyond a reasonable doubt and to a "moral certainty."

L. Alabama's scheme for compensating appointed counsel in capital cases denied petitioner effective assistance of counsel in violation of his constitutional rights; and

M. Petitioner received ineffective assistance of counsel at trial and on appeal in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.C. 2052, 80 L.Ed.2d 674 (1984), set out more fully below.

Ineffective Assistance of Counsel Claims

Petitioner's ineffective assistance claims under paragraph (M) above are as follows:

(I) Trial counsel failed to seek adequate compensation from the State and failed to object to not receiving adequate compensation, which resulted in insufficient devotion of time and resources to trial preparation, pretrial preparation, and the trial itself, including failing to obtain funds for an investigator to develop facts to defend the case and show mitigating circumstances;

(II) Before trial, counsel failed to adequately interview petitioner, witnesses, etc. in that trial counsel:

(a) failed to obtain *Brady/Giglio* material regarding witness Martha Henderson, and,

(b) failed to adequately prepare to litigate the motion for a change of venue;[5]

(III) At trial, counsel were ineffective because they:

(a) failed to insist that the jury be "life-qualified,"

(b) failed to object to the prosecutor's *Batson* violation;

(c) stated that they would show petitioner acted in self defense and that he would take the stand in his own defense and then failed to do so;

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[5] Though these two issues are presented in the petition by way of example, because petitioner has failed to set out any other specific allegations reflecting trial counsel's failure to prepare, he is limited, under this discrete claim, to the two examples set forth in the petition. Except for the two instances set forth above, this claim is too general to demonstrate any other deficiencies on the part of trial counsel before trial or how they may have prejudiced petitioner. In order to avoid a procedural bar for failure to raise a particular issue of ineffective assistance in a § 2254 petition, the exact claim must have been raised in the Rule 32 proceeding in State court. *See Picard v. Connor*, 404 U.S. 270, 275, 277, 92 S.C. 509, 512, 513, 30 L.Ed.2d 438 (1971); *Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir.1992). Thus, generalized claims of ineffective assistance of counsel are too vague to be considered by the court.

(d) failed to seek a cautionary instruction regarding petitioner's Fifth Amendment right not to testify;

(e) failed to make crucial objections at trial such as:
  (1) objecting to prejudicial courtroom conditions,
  (2) objecting to prosecutorial misconduct including,
    (i) the prosecutor's statement that he represented the family of the decedent,
    (ii) the prosecutor's statement about the defense failure to present evidence of self defense after promising to do so,
    (iii) references by the prosecutor to the suffering of the victim's family and the necessity to leave sympathy at the door when considering petitioner's penalty,
    (iv) the prosecutor's statement to the jurors that each had pledged to vote for the death penalty, and
    (v) the prosecutor's argument that, because there were only 14 capital offenses under Alabama law, the jury should more readily sentence the petitioner to death for committing two of them;

(3) moving for a mistrial because of a *Brady/Giglio* violation, and;
(4) objecting to the trial court's "reasonable doubt" instruction.

(IV) Trial counsel are alleged to have been ineffective at the sentencing phase of petitioner's trial for failing to investigate or present important evidence of mitigating circumstances, including:

(a) failing to investigate petitioner's family history and other evidence relating to petitioner's background and personal history;

(b) failing to obtain mental health expert testimony regarding the effects of family-background on mental health and behavior;

(c) failing to investigate and obtain evidence of the violent nature of the decedent toward petitioner's sister-in-law and her children;

(d) failing to object to the trial court's instruction on "heinous, atrocious, and cruel" even though those instructions were constitutionally infirm;

(e) failing to object to death by electrocution as violative of the

Eighth Amendment to the United States Constitution;

(f) failing to object to the trial court's instruction on murder during the course of a robbery;

(g) failing to object to an explanation of the verdict form as being of such a suggestive nature as to imply that the appropriate sentence in petitioner's case was death; and,

(h) failing to object to the court proceeding to the final sentencing on the basis of a presentence report which was presented to petitioner and petitioner's trial counsel on the day of sentencing and which contained an improper recommendation by its author in favor of imposing the death penalty.

(V) Petitioner alleges that appellate counsel were ineffective for the following reasons:

(a) failure to raise the Batson issue on appeal;

(b) failure to argue that death by electrocution was cruel and unusual punishment prohibited by the United States Constitution; and,

(c) failure to argue that the trial court's instruction regarding reasonable doubt was erroneous.

N. Finally, petitioner asserts that he did not knowingly, intelligently, and voluntarily waive his right to a fair hearing on his Rule 32 petition for a variety of reasons, including his lack of understanding as to what rights he was waiving, the trial court's failure to ascertain that he understood what he was giving up and (as stated in Doc. #28, Petitioner's Reply Brief) because the court appointed, the brother of one of the prosecuting attorneys to represent petitioner at his Rule 32 proceeding wherein petitioner, after a very short consultation, withdrew his petition.

DISCUSSION

Issues Raised on Direct Appeal

Certain issues raised by petitioner in his § 2254 petition were previously presented and considered on their merits in the direct appeal of his conviction and sentence. These issues, enumerated as set out above and briefly summarized, are:

B. Denial of individual voir dire;

C. Denial of motion for change of venue;

E. Denial of "reverse-*Witherspoon*" voir dire;

F(II). *Brady/Giglio* violation;

F(III). Improperly seating brother of decedent at counsel table;

F(IV). Improper argument regarding no evidence of self defense;

F(V). Improper argument by the prosecutor regarding sympathy;

F(VI). The prosecutor improperly advising the jurors that they had pledged to vote for death;

F(VII). The prosecutor improperly suggested that, because there are only 14 capital crimes in Alabama, petitioner was more deserving of death because he committed two of them;

G. The trial judge improperly allowing the jury to decide if decedent's death was especially heinous, atrocious, and cruel;

H. The trial judge giving an overly broad definition of murder during robbery; and,

K. The trial judge improperly considering the late presentence report and the recommendation of the State probation officer contained therein.

Since these issues were raised on direct appeal, potential state court remedies are exhausted. 28 U.S.C. § 2254(b)(1)(A). Thus, with regard to these issues, procedural default is not an issue.

Petitioner's claims are governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). *Neelley v. Nagle*, 138 F.3d 9117, 921 (11th Cir. 1998)(citing *Lindh v. Murphy*, 521 U.S. 320, 117 S.C. 2059, 138 L.Ed.2d 481 (1997)). The AEDPA provides in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). This statute requires that a court first determine whether the federal law applicable to petitioner's claim has been clearly established by the Supreme Court. *Neelley*, 138 F.3d at 924. Next, the court must determine if the state court's adjudication of the claim was contrary to established Supreme Court law. This can occur in two ways. The first would be when a state court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier, but given these facts the state court reaches a conclusion different from the Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362,404-08,120 S.C. 1495,1519-20, 146 L.Ed.2d 389 (2000). The second situation is one in which a state court, in contravention of Supreme

Court case law, fails to apply the correct legal principles to decide a case. Such a result would be "contrary" in the sense that the state court has not adjudicated the claim in the manner prescribed by the Supreme Court. *Id.* at 404-05, 120 S.C. at 1519. Both of these types of errors are errors of pure law; in the first case, a state court has denied a petitioner a constitutional right defined by the Supreme Court in its role as interpreter of the Constitution, while in the second the state court has failed to apply the proper law to a case. *Neelley*, 138 F.3d at 923-24. If a state court's decision is not contrary to the law as established by the Supreme Court, the habeas court must determine whether the law was applied in an unreasonable manner. A state court decision involves an unreasonable application of Supreme Court precedent if the state court identifies the correct governing rule from the court's cases but unreasonably applies it to the facts of the case. An application is also unreasonable if the state court either unreasonably extends a legal principle of Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams v. Taylor*, 529 U.S. at 406-07, 120 S.C. at 1520. When making this determination, the state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect. *Neelley*, 138 F.3d at 92425. The federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. at 409, 120 S.C. at 1521. Under this method of analysis, an erroneous or incorrect application of Supreme Court law is not necessarily an "unreasonable application."

With regard to any findings of fact which bear on the state court's decision, the AEDPA gives the following direction:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

Claim B - Denial of Individual Voir Dire

Petitioner alleges that he was denied his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because he was denied individual voir dire of the panel of jurors called for his case. Petitioner asserts that this was especially prejudicial in light of the trial court's failure to "life-qualify" the jurors and extensive pretrial publicity.

On direct appeal, the Alabama Court of Criminal Appeals considered this same claim and rejected it on its merits. That court, citing *Hallford v. State*, 548 So.2d 526, 538-39 (Ala.Crim.App. 1988), *aff'd*, 548 So.2d 547 (Ala.), *cert. denied*, 493 U.S. 945, 110 S.C. 354, 107 L.Ed.2d 342 (1989), noted that "[e]ven in capital cases, there is no requirement that a defendant be allowed to question each prospective juror individually during voir dire examination." *Henderson*, 583 So.2d at 283. The court also found no abuse of discretion in the trial court's refusal to allow individual voir dire, stating:

> Here, the record reveals that the trial court conducted voir dire of the prospective jurors in panels of 13. Thus, there was some individualization of the voir dire

> process. Moreover, once the trial court concluded its voir dire of the members of each panel, both the prosecutor and defense counsel were afforded an unlimited amount of time in which to conduct their own voir dire.

Id. Based on this, the court found that no harm resulted to petitioner as a result of the trial court's decision.

The validity of this claim is controlled by the Supreme Court's holding in *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.C. 1899, 114 L.Ed.2d 493 (1991). In *Mu'Min*, a prison inmate serving a sentence for first degree murder allegedly committed another murder while he was out on work release. The case engendered substantial publicity. Approximately three months before trial, the accused submitted to the Virginia trial court 47 newspaper articles related to the murder. Several of the articles discussed details of the murder, the accused's prior criminal record, the fact that he had been rejected for parole six times, and indications that he had confessed to the crime.

The trial court denied the defendant's motion for individual voir dire and refused to ask any of the defendant's proposed questions relating to the content of news items the jurors might have read or seen. The jurors first were questioned by the trial judge as a group, including certain follow-up questions to those who stated they had acquired information about the alleged offense or the accused from the news media or any other source, none of which concerned the source or content of the information. The trial court then conducted further voir dire of the prospective jurors in panels of four. Eight of the twelve venire persons who were sworn as jurors had answered on voir dire that they had read or heard something about the case, but none of them indicated

that they had formed an opinion about the case or would be biased in any way.

The Supreme Court held that the defendant's right to an impartial jury under the Sixth Amendment to the United States Constitution and his right to due process under the Constitution's Fourteenth Amendment had not been violated by the trial judge's refusal to allow individual voir dire of the jurors relating to the specific contents of the news reports to which they had been exposed, because (1) such questions were not required under the due process clause since (a) although seeing individual prospective jurors answer such questions would be of some use in exercising peremptory challenges, such challenges were not required by the Constitution, (b) although content questions might be helpful in assessing whether a potential juror was impartial, such questions were constitutionally compelled only if the trial court's failure to ask them rendered the trial fundamentally unfair, and (c) there was no consensus, or even weight of authority, favoring content questions; (2) the Supreme Court's cases had stressed the wide discretion granted to a trial court in conducting voir dire in the area of pretrial publicity and other areas of inquiry that might tend to show juror bias; (3) since the trial judge sat in the locale where pretrial publicity was said to have had its effect, the judge's perception of the depth and extent of the news stories that might influence a juror should be of assistance in deciding how detailed an inquiry to make; and (4) the voir dire as conducted in this case was not perfunctory and covered the subject of possible bias from pretrial publicity.

As noted above, the trial judge in petitioner's case conducted voir dire in panels of 13 and allowed the prosecutor and defense counsel unlimited time to conduct their own voir dire. According to the Alabama Court of Criminal Appeals,

petitioner submitted various articles to the trial court that had been printed in the local newspaper concerning the murder. The early articles make no mention of petitioner because law enforcement officials were unable to make any arrests until over three-and-a-half years after the murder. However, petitioner is named in all articles dating from the time of petitioner's arrest in September 1987 until the date of his trial (begun on May 16, 1988). Several articles concerned petitioner's case exclusively. *Henderson*, 583 So.2d at 282.

The Alabama Court of Criminal Appeals stated that its examination of the articles revealed that all of the articles were objective and factual in detailing the crime and developments in petitioner's case. In addition, only 17 of 51 prospective jurors had read or heard something about the case, and further questioning revealed that all of these jurors would be able to disregard this information and render a fair verdict based solely on the evidence presented at trial. *Id.*

The trial court also conducted voir dire of the prospective jurors regarding their views on imposing the death penalty. The court "death-qualified" the jurors, asking whether any of them were so opposed to the death penalty that they would never under any circumstances vote to impose the death penalty. *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.C. 1770, 20 L.Ed.2d 776 (1968). The court also instructed the prospective jurors that, in addition to not holding a fixed opinion against imposing the death penalty, they must also not hold a fixed opinion against penitentiary punishment. *Henderson*, 583 So.2d at 283. However, the trial court did not specifically "life-qualify" the jury with a "reverse-*Witherspoon*" inquiry.

Thereafter, the prosecutor and defense counsel were given the opportunity to conduct their own voir dire. At no time did

defense counsel object to the extent of the trial court's voir dire or attempt to "life-qualify" the prospective jurors himself. *Id.* Based on these facts, the Alabama Court of Criminal Appeals found that the trial court made an adequate inquiry into whether each of the venire persons could follow the court's instruction regarding capital punishment and that the failure to "life-qualify" the jury did not seriously affect the fairness of the proceedings against petitioner. *Id.* at 284.

The facts of this case have many similarities to *Mu'Min*. Applying the analysis set forth by the Supreme Court in that case leads to the conclusion that the decision of the Alabama Court of Criminal Appeals is not contrary to the law as established by the Supreme Court, nor was the law applied in an unreasonable manner. Therefore, this claim is without merit.

Claim C - Denial of Motion for Change of Venue

Petitioner alleges that the trial court's denial of his motion for a change of venue violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Petitioner asserts that the numerous articles regarding the killing reflected an extraordinary interest by the community in this crime and his trial. Henderson also states that of the 17 venire persons who had an admitted familiarity with the news reports of the case, two ultimately sat on the jury. He asserts that these facts, combined with the trial court's failure to allow individual voir dire, violated petitioner's constitutional rights.

As noted above, the Alabama Court of Criminal Appeals considered this claim and rejected it *Henderson*, *supra*. It examined the news articles and the voir dire conducted by the trial court regarding this publicity and noted that, of those

prospective jurors who had read or heard something about the case, all indicated that they would be able to disregard this information and render a fair and impartial verdict based upon the evidence. *Id.* at 282.

In determining whether unduly prejudicial pretrial publicity should have resulted in a change in venue, the United States Supreme Court requires that the appellate court look at the "totality of the circumstances." *Sheppard v. Maxwell*, 384 U.S. 333, 352, 86 S.C. 1507, 1517, 16 L.Ed.2d 600 (1966). According to the Eleventh Circuit Court of Appeals, in order for petitioner to prevail on his claim of being denied a fair trial, he must show either actual or inherent prejudice. *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991)(citing *Holbrook v. Flynn*, 475 U.S. 560, 106 S.C. 1340, 89 L.Ed.2d 525 (1986), and *Irvin v. Dowd*, 366 U.S. 717, 81 S.C. 1639, 6 LEd.2 d 751 (1961)). The test for inherent prejudice is not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. *Id.* (citations and internal quotations omitted). This test requires the appellate court to examine two factors: first, whether there is an "impermissible factor coming into play" and second, whether it poses an "unacceptable risk." *Id.* The Alabama Court of Criminal Appeals, in essence, applied this analysis to the facts underlying petitioner's claim of prejudicial pretrial publicity and found no harm to petitioner.

The undersigned concludes that the decision of the Alabama Court of Criminal Appeals regarding this issue is not contrary to the law as established by the Supreme Court, nor was it applied in an unreasonable manner. Therefore, this claim is without merit.

Claim E - Denial of "Reverse-*Witherspoon*" Voir Dire

Petitioner asserts that the trial court's failure to propound "reverse-*Witherspoon*" questions to "life-qualify" prospective jurors violated petitioner's right to an impartial jury in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As noted above, the Alabama Court of Criminal Appeals considered this issue in petitioner's direct appeal and found it to be without merit. With regard to this issue, the court stated:

> Our examination of the record reveals that, while qualifying each of the four panels of prospective jurors, the trial court instructed the jurors that "You must not have a fixed opinion against capital or penitentiary punishment to the extent that you would refuse to impose the death penalty, regardless of the evidence produced and the Court's charge to the law, or you must not have a fixed opinion against penitentiary punishment." The trial court then asked the prospective jurors: "Do any of you have a fixed opinion against capital punishment?" After some additional remarks, the trial court turned the voir dire over to first the prosecuting and then the defense attorneys. At no time during voir dire did defense counsel object to the trial court's voir dire or request that the trial court "life-qualify" the prospective jurors. Moreover, defense counsel made no attempt to "life-qualify" the prospective jurors during his questioning of the jurors.
>
> The appellant's failure to preserve this issue, however, "while weighing against defendant as to any possible

claim of prejudice, serves as no impediment to our scope of review pursuant to the 'plain error' mandate in death penalty cases." *Ex parte Bush*, 431 So.2d 563, 565 (Ala.), *cert. denied*, 464 U.S. 865, 104 S.C. 200, 78 L.Ed.2d 175 (1983). Therefore, we must now consider whether the trial court's failure to "life-qualify" the prospective jurors constituted "plain error." Our Supreme Court has adopted federal case law defining plain error, holding that "[p]lain error only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." *Ex parte Womack*, 435 So.2d 766, 769 (Ala.), *cert. denied*, 464 U.S. 986, 104 S.C. 436, 78 L.Ed.2d 367 (1983). *See also Ex parte Harrell*, 470 So.2d 1309, 1313 (Ala.), *cert. denied*, 474 U.S. 935, 196 S.C. 269, 88 L.Ed.2d 276 (1985).

We find that the failure of the trial court to "life-qualify" the jury did not seriously affect the fairness of the proceedings against the appellant. With the exception of two prospective jurors who were unalterably opposed to capital punishment, all of the jurors indicated that they could follow the trial court's instructions regarding capital punishment. "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." *Dutton v. Brown*, 812 F.2d 593, 595 (10th Cir.), *cert. denied sub nom Dutton v. Maynard*, 484 U.S. 836, 108 S.C. 116, 98 L.Ed.2d 74 (1987). Although dicta exists for the proposition that a trial court should "life-qualify" as well as "death-qualify" a jury, *United States v. Van Scoy*, 654 F.2d 257, 262-63 (3d Cir.), *cert. denied*, 454 U.S. 1126, 102 S.C. 977, 71

> L.Ed.2d 114 (1981), we are unable to find any authority which requires a trial judge to do so. Indeed, the only case which directly addresses this issue holds contrary to appellant's position. *See People v. Jones*, 169 Ill.App.3d 883, 524 N.E.2d 593, 604, 120 Ill.Dec. 563 (1988)(murder defendant's right to jury drawn from fair cross-section of community not violated when trial court death-qualified jury but did not "life-qualify" jury). In light of the fact that all but two of the jurors (the two opposed to capital punishment) indicated they could follow the court's instructions regarding capital punishment and that defense counsel had the opportunity, during voir dire to "life-qualify" the jury but failed to do so, we find that the appellant was in no way harmed because the prospective jurors were not "life-qualified." Thus, no "plain error" occurred.

Henderson v. State, 583 So.2d at 283-84.

In *Bracewell v. State*, 506 So.2d 354, 358 (Ala.Crim.App. 1986), the court stated:

> Upon proper request, a jury venire in a capital case should be questioned as to whether or not any venireperson has a fixed opinion in favor of capital punishment. The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views, would, prevent, or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

506 So.2d at 358 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.C. 844, 852, 83 L.Ed.2d 841 (1985); *Adams v.*

Texas, 448 U.S. 38, 45,100 S.C. 2521, 2526, 65 L.Ed.2d 581 (1980)) (internal quotation marks omitted). This holding is in accord with the United States Supreme Court's subsequent ruling in *Morgan v. Illinois*, 504 U.S. 719, 112 S.C. 2222, 119 L.Ed.2d 492 (I 992). Because *Morgan* had not been decided at the time the Alabama Court of Criminal Appeals considered petitioner's direct appeal, the law in that area cannot be said to have been "clearly established" at that time. Nevertheless, as the Alabama Court of Criminal Appeals noted, petitioner's trial counsel failed to make a "proper request" that the venire be "life-qualified." *Morgan* requires such a request to have been made. *Id.* at 736, 112 S.C. at 2233.

Before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." *United* States *v. Olano*, 507 U.S. 725, 732, 113 S.C. 1770, 1776, 123 L.Ed.2d 508 (1993). If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United* States *v. Young*, 470 U.S. 1, 15, 105 S.C. 1038, 1046, 84 L.Ed.2d 1 (1985), in turn quoting *United* States *v. Atkinson*, 297 U.S. 157, 160, 56 S.C. 391, 392, 80 LED. 555 (1936)). After considering the totality of the trial court's voir dire relating to the imposition of the death penalty, the Alabama Court of Criminal Appeals determined that there was no error. The decision of the Alabama Court of Criminal Appeals regarding this issue is not contrary to the law as established by the United States Supreme Court, nor was the law applied in an unreasonable manner. Therefore, this claim is without merit.

Claim F(II) - *Brady/Giglio* Violation

Petitioner makes several allegations of prosecutorial misconduct. One such assertion is that the prosecutor withheld *Brady/Giglio* impeachment material of great significance concerning promises or benefits bestowed upon Martha Henderson, a key prosecution witness, that she would never be prosecuted by the State of Alabama for any culpability she might have had in the murder of Jerry Haney.

This issue was raised on petitioner's direct appeal to the Alabama Court of Criminal Appeals and was found to be without merit. That court described the circumstances as follows:

> At trial, Martha Henderson testified as a prosecution witness and was questioned about a conversation between the appellant and Judy Haney to which she had been a witness. During the conversation, appellant related the details of how he had killed Jerry Haney to his wife and his sister-in-law, Judy Haney. During direct examination, no mention was made of "a deal" between Martha Henderson and the State whereby she would not be prosecuted in exchange for her testimony against appellant. Likewise, during cross-examination defense counsel failed to ask Mrs. Henderson if she was testifying pursuant to a deal made with Talladega County law enforcement officials. However, during the cross-examination of the very next State's witness, Investigator Dennis Surrett, evidence of a deal between Martha Henderson and law enforcement officials was made known to the jury. Indeed, when asked whether a deal was made, Investigator Surrett readily admitted that the district attorney's office had agreed not to prosecute Ms. Henderson in exchange

> for her testimony against the appellant and Judy Haney.

583 So.2d at 284. The issue of whether the prosecutor violated the rule of *Brady* and its progeny was not raised at trial and was presented for the first time on appeal.

The appellate court found that this evidence was impeachment evidence which clearly should have been disclosed. *Id.* at 285. However, because the issue was not raised at trial, the appellate court reviewed this omission under the plain error standard. Although the State disputed the contention that it failed to disclose this information, the court assumed, *arguendo*, that it did. However, the court noted that the evidence of Martha Henderson's deal with law enforcement officials made in order to avoid prosecution herself was made known to the jury through Surrett. The court concluded, therefore, that this failure to, disclose did not seriously affect the integrity of the proceedings against the petitioner. *Id.* at 285. The decision of the Alabama Court of Criminal Appeals regarding this issue is not contrary to the law as established by the Supreme Court. *See United States v. Olano, supra.* Under these facts, the undersigned cannot conclude that the decision of the Alabama Court of Criminal Appeals was objectively unreasonable. *See Williams v. Taylor*, 529 U.S. at 409, 120 S.C. at 1521. Therefore, this claim is without merit.

Claim F(III) - Improperly Seating Victim's Brother at Counsel Table

Petitioner asserts that prosecutorial misconduct occurred when the district attorney had the brother of the decedent seated at counsel table throughout trial and, during opening and closing arguments, claimed to be representing the family

of Jerry Haney. This argument was addressed and rejected on direct appeal by the Alabama Court of Criminal Appeals.

The appellate court noted that the presence of the victim or a representative of the victim seated at counsel table for the prosecution is specifically provided for by The Alabama Crime Victims' Court Attendance Act, codified at §§15-1 4-50, et seq., *Alabama Code* (1975). 583 So.2d at 285-86. Any claim that this statute is unconstitutional previously had been addressed and rejected by that court. *Id.* at 286. The appellate court also rejected the applicability of *Booth v. Maryland*[6] and *South Carolina v. Gathers*,[7] holding these cases inapplicable because they dealt only with the presentation of evidence and argument of counsel at a capital sentencing proceeding regarding the character of the victim, impact on the victim's family, or the opinion of the victim's family as to the appropriate sentence to be imposed. Neither of these decisions pertained to the presence of the victim's family at the counsel table. *Id.* The appellate court also found nothing wrong with introducing the family representative to the jury or any error in a brief statement suggesting that the prosecuting attorney speaks for the family. *Id.*

Nowhere does Henderson argue that the state court decision was contrary to or involved an unreasonable application of clearly established Supreme Court law. Even if *Booth* and *Gathers* somehow were applicable to these actions, these cases have been overruled by *Payne v. Tennessee*, 501 U.S. 808, 111 S.C. 2597, 115 L.Ed.2d 720 (1991). Therefore, petitioner cannot show that he was prejudiced in any way. Under these facts, the undersigned cannot conclude

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[6] 482 U.S. 496, 107 S.C. 2529, 96 L.Ed.2d 440 (1987)

[7] 490 U.S. 805, 109 S.C. 2207, 104 LEd.2d 876 (1989)

that the decision of the Alabama Court of Criminal Appeals was objectively unreasonable. *See Williams v. Taylor, supra.* Therefore, this claim is without merit.

Claim F(IV) - Improper Argument of No Evidence of Self Defense

Petitioner asserts that the prosecutor improperly argued that the defendant had "promised self defense. The Judge won't even charge on it. There's not one iota of self defense in this case." The Alabama Court of Criminal Appeals addressed the self defense issue and rejected it. However, it did not specifically address petitioner's contention that the prosecutor's argument regarding the lack of evidence of self defense was improper. Thus, this issue is exhausted, but there has been no adjudication on its merits. Therefore, the undersigned will address it.

The record reflects that petitioner's trial counsel told the jury at the outset of the case that petitioner would show that he acted in self defense and that he would take the stand in his own defense. TR. 64-67. However, petitioner never took the stand, and the appellate court found that self defense was never established by the defense.

According to the appellate court, under Alabama law, a person is not justified in using deadly force upon another person if it reasonably appears or he knows that he can avoid the necessity of using such force with complete safety by retreating. *Henderson*, 583 So.2d at 288 (citing § 13A-3-23(b), *Alabama Code* (1975)). It further stated that, as a general rule, a defendant is not entitled to have his claim of self defense submitted to the jury if the undisputed evidence shows clearly, *inter alia,* that the accused was able to retreat, *Id.* (quoting C. Gamble, *McElroy's Alabama Evidence*

§ 457.02(5)(a) (3d ed. 1977)). In addition, to justify conduct through a claim of self defense, the accused must neither provoke nor encourage the difficulty. *Id.* (quoting *Finchum v. State*, 461 So.2d 37,-39 (Ala.Crim.App. 1984)).

In addition, evidence of a deceased's turbulent, violent, and bloodthirsty character is not competent evidence absent some other evidence tending to show that the killing was in self defense. These same principles apply when the evidence sought to be admitted is the victim's violence toward third parties. *Henderson*, 583 So.2d at 289.

According to the appellate court, the evidence at trial established the following:

> Our examination of the record convinces us that the appellant has failed to meet the burden of proving self defense. Indeed, the evidence, including the appellant's statement to law enforcement officials, clearly established that the appellant was the aggressor. He and the victim's wife planned the murder, and the appellant agreed to carry it out in exchange for $3000. The appellant made several phone calls looking for the right type of ammunition. Next, he invited people to his home so that he would have an alibi. Finally, on the night in question, he pleaded illness to his guests and retired to his bedroom; he then climbed out the window, drove to the victim's home in Talladega County, lured the victim outside, and shot him three times while the victim pleaded for his life.

* * * * *

> Likewise, when the appellant sought to develop this issue during the cross-examination of Martha Henderson, there was no evidence of self defense. In fact, her testimony established that the appellant, and not the victim, was the aggressor. Since Ms. Henderson's testimony did not establish that the appellant was acting in self defense, any prior acts of violence would not have been admissible during Ms. Henderson's cross-examination.

Id. at 289-90.

Because petitioner did not object to the prosecutor's statements at trial, the standard of review is whether the prosecutor committed plain error." *E.g.*, *United States v. Hernandez*, 921 F.2d 1569, 1573 (11th Cir.), *cert. denied sub nom, Tape v. United States*, 500 U.S. 958, 111 S.C. 2271, 114 L.Ed.2d 722 (1991); *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir. 1988). Plain error is "error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity and public reputation of judicial proceedings." *Sorondo*, 845 F.2d at 949 (quoting *United States v. Russell*, 703 F.2d 1243, 1248 (11th Cir. 1983)). The Eleventh Circuit, in *United States v. Rodgers*, 981 F.2d 497, 499 (11th Cir. 1993), has stated that remarks made in closing argument, although improper if viewed in isolation, are not improper if they are replies-in-kind to comments a defendant's trial counsel had made during the defendant's opening or closing statements.

The undersigned cannot say that the prosecutor committed plain error in this case. Petitioner's trial counsel promised evidence of self defense. He attempted to develop such evidence through the cross-examination of Martha Henderson but was unable to do so. It is clear that the prosecutor's

reference to the lack of evidence of self defense was a reply-in-kind to petitioner's counsel's opening statement that he would produce evidence of self defense. Therefore, this argument was proper and petitioner's claim is without merit.

Claim F(V) - Improper Argument by Prosecutor Regarding Sympathy

Henderson asserts that the prosecutor improperly appealed to the suffering of the victim's family and improperly argued that the jurors should leave sympathy at the door when deliberating on its penalty phase verdict. This issue was addressed by the Alabama Court of Criminal Appeals and rejected. That court noted, correctly, that this alleged instance of misconduct was not raised before the trial court. Therefore, it performed a "plain error" analysis in determining that no reversal was warranted.

With regard to the issue of sympathy, the State appellate court found as follows:

> The appellant further argues that in several instances during the trial, the prosecutor committed reversible error by telling the jury not to consider sympathy in reaching its decision. The following occurred during the voir dire:
>
> > I think the Judge will tell you that as a juror you should decide what the true facts in this case are, that you will take the evidence that comes to you from the witness stand, being testimony and exhibits and that you would take those and apply the law to them that the Judge gives you and that you should not consider any sympathy or speculation or conjecture but that

> which comes to you from the witness stand under oath.
>
> I think the Judge will charge you that a case should be decided on the evidence and that being the testimony and the exhibits that come from the witness stand and then the Judge's charges as to the law. It should not be decided upon any type of sympathy or upon any speculative or speculation or conjecture. Is there any one of you, if you are selected as a juror, that could not render a fair and impartial verdict based strictly upon the evidence that comes to you from the witness stand?

And the following occurred during the closing argument in the guilt phase:

> I stand here a bunch of times, day after day, week after week, month after month, and year after year. And I stand in the same position and this is what I do. I try cases like this. You ladies and gentlemen are from all over this county, not because you wanted to come, but because of an obligation. You came and you fulfilled that obligation. We didn't tell you that when you came in here on Monday that it was going to be easy, because I knew what was in store. I know it is a hard decision. It ought to be something you think about. But I submit this to you ladies and gentlemen, that when you walk into this room, you shed sympathy. You shed fear and you shed those things as a normal human being that you are entitled to have. When you go home several hours from

> now you have a right to put those things back on and be afraid, to have fear.

> The United States Supreme Court in *California v. Brown*, 479 U.S. 538, 107 S.C. 837, 93 L.Ed.2d 934 (1987), faced the question of "whether an instruction informing jurors that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling during the penalty phase of a capital murder trial violates the Eighth and Fourteenth Amendments to the United States Constitution." *Brown*, 479 U.S. at 539, 107 S.C. at 838.
>
> The Court said that this charge was "meant to confine the jury's deliberations to considerations arising from the evidence presented. . . . It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors." *Brown*, 479 U.S. at 543, 107 S.C. at 840.
>
> The reference to sympathy for the victim's family are those which are specifically prohibited. *See Rutledge v. State*, 523 So.2d 1087 (Ala. Crim. App. 1987), *reversed on other grounds*, 523 So.2d 1118 (Ala. 1988); *Lowman v. State*, 38 Ala.App. 612, 91 So.2d 697, *cert. denied*, 265 Ala. 698, 91 So.2d 700 (1956).

Henderson, 583 So.2d at 301-02. The State appellate court held that the remarks made by the prosecutor were acceptable as provided in *Brown, supra.*

The appellate court also reviewed the comments of the prosecutor in the context of this particular trial, rather than in

the abstract, and concluded that the argument of the prosecutor did not "so inflict the trial court with unfairness as to make the resulting conviction a denial of due process." *Henderson*, 583 So.2d at 304 *(quoting Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.C. 2464, 91 L.Ed.2d 144 (1986), itself quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.C. 1868, 40 L.Ed.2d 431 (1974)).

In *Darden,* the prosecutor made numerous improper remarks in closing argument. They included: "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now. . . ." *Id.* at n.10. The prosecutor in that case also argued: "As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason." *Id.* at n.11. "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Id.* at n.12. "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." *Id.*

With regard to these arguments, the Supreme Court stated:

> That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred, n9. Some comments implied that the death penalty would be the only guarantee against a future

similar act. n 10. Others incorporated the defense's use of the word "animal." n11. Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case. n12 These comments undoubtedly were improper. But as both the District Court and the original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 699 F. 2d, at 1036. The relevant question is whether the prosecutors comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.* at 642.

Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial, n13 The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. *See Darden v. Wainwright*, 513 F. Supp. at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *United States v. Young*, 470 U.S. 1 (1985), the idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Id.* at 13. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and

> that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," 329 So.2d at 291, reduced the likelihood that the jury's decision was influenced by argument.

Id. at 179-82, 106 S.C. at 2471-72. The Court ultimately concluded that Darden's trial was not perfect but it was not fundamentally unfair. *Id.* at 182, 106 S.C. at 2472.

The record of the trial court proceedings reflects also that the prosecutor's argument did not misstate or manipulate the evidence, nor implicate other specific rights of the accused. While the particular comment disputed here was not an invited response, as noted above, some of the prosecutor's argument was reply-in-kind. The trial court instructed the jury that the arguments of Counsel were not evidence, TR. 566, and the weight of the evidence against the petitioner was heavy. Therefore, the undersigned concludes that the decision of the Alabama Court of Criminal Appeals is not contrary to the law as established by the Supreme Court, nor was the law applied in an unreasonable manner. Therefore, this claim is without merit.

Claim F(VI) - Prosecutor Improperly Advising Jurors They Had Pledged to Vote for Death

Petitioner asserts that the prosecutor improperly argued to the jury that the jurors had each pledged to vote for death in this case. The appellate court rejected this claim, stating that it was unsupported by the record:

> The appellant's fourth contention of prosecutorial misconduct is simply not supported by the record, n4

> In fact, the prosecutor's remark was not that the jurors had pledged to vote for death, but that, "[W]hen we came into this courtroom on Monday morning, "we made certain pledges to each other, that you would try the issues joined between the State of Alabama and the defendant and render a fair and impartial verdict based upon the evidence that comes to you from the witness stand, and I never doubted for a moment that you would do that. That you were not opposed to capital punishment, and I never doubted for a moment that you would consider it, and that's what we ask you to consider. To do what you think is right and what you think is just in this case."

Henderson, 583 So.2d at 303. The prosecutor made no statement that the jurors had pledged to vote for death. Therefore, the decision of the Alabama Court of Criminal Appeals with regard to this issue is not contrary to the law as established by the Supreme Court, nor was the law applied in an unreasonable manner. Therefore, this claim is without merit.

Claim F(VII) - Prosecutor Suggesting Petitioner Was More Deserving of Death Because He Had Committed Two of Fourteen Capital Crimes

Petitioner asserts that the prosecutor improperly suggested that, because there are only 14 defined capital crimes in Alabama, jurors should more readily sentence petitioner to death because he committed two of them. The Alabama Court of Criminal Appeals rejected this claim. *Id.* at 304.

The argument petitioner finds objectionable is as follows:

> Fourteen times the Legislature of the State of Alabama says that you can receive capital-punishment in the State of Alabama. Only fourteen different crimes. This defendant has committed two of them.

TR. 766. No objection was raised at trial as to this statement. Therefore, it is subject only to review for plain error. The State appellate court analyzed this argument concurrently with the prosecutor's argument regarding jurors leaving sympathy at the door when deliberating on its penalty phase verdict, outlined under claim F(V) above. The trial court, applying *Darden v. Wainwright*, *supra*, found no due process violation. For the same reasons cited under Claim F(V), above, the undersigned concludes that the decision of the Alabama Court of Criminal Appeals is not contrary to the law as established by the Supreme Court, nor was the law applied in an unreasonable manner. Therefore, this claim is without merit.

Claim G - Court Improperly Allowing Jury to Consider If Victim's Death Was Especially Heinous, Atrocious and Cruel

Petitioner asserts that the trial judge improperly allowed the jury to decide if decedent's death was especially "heinous, atrocious, and cruel," in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Alabama Court of Criminal Appeals rejected this claim. *Henderson*, 583 So.2d at 300. Petitioner contends that, since the trial judge concluded, in sentencing petitioner, that the murder was not especially heinous, atrocious or cruel, this aggravating factor did not exist.

The State appellate court found that the facts in this case could have supported a finding, of heinous, atrocious and cruel, citing *Hallford v. State*, 548 So.2d at 535. In *Hallford*,

the victim was shot once, rendering him helpless, dragged to a river while pleading for his life, and then shot in the head twice. These facts were found to constitute heinous conduct. The court further found:

> In the instant case, evidence established that the victim was shot once when he exited his home. When he tried to run away, he was shot again and collapsed, The victim pleaded with the appellant, his brother-in-law, to get help and not to shoot him again. The appellant, disregarding his pleas, put the shotgun to the victim's head and shot him a third time. This bullet fractured almost every bone in the victim's skull and one tooth was driven into the victim's spinal cord. Surely, like the murder in *Hallford*, this murder also could be found to be heinous, atrocious, or cruel. (For a thorough discussion of what constitutes heinous, atrocious, or cruel, see 63 A.L.R. 4th 478.) "This act was conscienceless and pitiless and torturous." *Hubbard v. State*, 500 So.2d 1204, 1227, *aff'd*, 500 So.2d 1231 (Ala. 1986), *cert. denied*, 480 U.S. 940,107 S.C. 1591, 94 L.Ed.2d 780 (1987). As Judge Tyson stated in *Whisenhant v. State*, 482 So.2d 1225,1236 (Ala.Crim.App. 1982), *remanded on other grounds,* 482 So.2d 1241 (Ala. 1983): "The jury is not free . . . to arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence.

Henderson, 583 So.2d at 300.

The trial court's conclusion that there was sufficient evidence to let the issue of whether the killing of Haney was especially heinous, atrocious, and cruel be considered by the jury is borne out by the record. *See Clark v. State*, 728 So. 2d 1117 (Ala.Crim.App. 1996) (When the defendant deliberately

shoots the victim in the head in a calculated fashion, after the victim already has been rendered helpless by prior gunshots, such extremely wicked or shockingly evil action may be characterized as especially heinous, atrocious, or cruel for capital sentencing purposes). The trial court's charge to the jury concerning this aggravating factor was as follows:

> The word "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked or vile. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.
>
> What is intended to be included in these aggravating circumstances is those cases where the actual commission of a capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.
>
> For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be conscienceless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness or atrociousness or cruelty exceeds that which exists when a capital offense is committed.

TR. 777-78

This instruction does not run contrary to *Maynard v. Cartwright*, 486 U.S. 356, 108 S.C. 1853, 100 LED. 2d 372 (1988), or *Godfrey v. Georgia*, 446 U.S. 420, 100 S.C. 1759, 64 L.Ed.2d 398 (1980), as petitioner asserts. The overriding objection to the jury's consideration of the "heinous, atrocious, and cruel" aggravating factor in those cases was the lack of guidance in the jury instructions regarding the elements necessary to find this factor present. The Supreme Court in *Godfrey* stated:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation.

Id. at 428-29, 100 S.C. at 1765 (footnote omitted). In this case, the trial judge gave a precise instruction to the jury regarding this aggravating circumstance sufficient to avoid the arbitrary and capricious infliction of the death sentence. Therefore, petitioner's claim that this aggravating factor was overbroad and vague is without merit.

Petitioner also asserts that, because the trial judge ultimately concluded that the murder was not especially heinous, atrocious and cruel, this aggravating factor did not exist. Therefore, according to petitioner, the jury considered an invalid aggravating circumstance, requiring the death sentence to be set aside under *Espinosa v. Florida*, 505 U.S. 1079, 112 S.C. 2926, 120 L.Ed.2d 854 (1992). The undersigned finds that this argument is without merit. It implies that, if a jury is charged with determining whether more than one aggravating circumstance exists and the jury returns a recommendation of death, then the trial judge must find that all the charged aggravating factors exist if he is to sentence the defendant to death because failure to do so would mean that the jury was allowed to consider an invalid aggravating circumstance. This result is not implied by *Espinosa*. In *Espinosa,* the Supreme Court reversed a death sentence based on the jury's consideration of an overly broad aggravating circumstance. Though one other aggravating factor considered by the jury was valid and the jury's decision was only a recommendation to the trial judge who ultimately determined whether to impose death, the Court stated that, because Florida law required the sentencing judge to give consideration to the jury's recommendation, he, at least indirectly, considered an invalid factor in reaching his sentencing decision.

In this case, the jury did not consider an invalid aggravating factor. As noted above, the trial judge gave the jury a sufficiently narrow definition of "heinous, atrocious and cruel" to avoid unconstitutional overbreadth. Not only was the aggravating factor appropriately defined, there was, notwithstanding the findings of the sentencing judge, evidence in the record to support a finding that the murder was heinous, atrocious and cruel.

Furthermore, the jury's verdict is only advisory in nature. The sentencing judge is required to independently weigh the aggravating and mitigating circumstances. While the Alabama statute requires the trial judge to consider the jury's recommendation, it is not required to give it "great weight." *Harris v. Alabama*, 513 U.S. 504, 508, 115 S.C. 1031, 1034, 130 L.Ed.2d 1004 (1995). Therefore, the sentencing judge is free to reach his own conclusions regarding the existence or absence of aggravating and mitigating circumstances. "[T]he Constitution permits the trial judge, acting alone, to impose a capital sentence . . . . It is not offended when a State further requires the judge to consider a jury recommendation and trusts the judge to give it the proper weight." *Id.* at 515, 115 S.C. at 1037.

The undersigned concludes that the decision of the Alabama Court of Criminal Appeals is not contrary to the law as established by the Supreme Court, nor was the law applied in an unreasonable manner. Therefore, this claim is without merit.

Claim H - Overly Broad Definition by Trial Judge of Murder During Robbery

Petitioner asserts that the trial judge's decision to instruct the jury regarding murder during robbery rendered the use of this aggravating factor unconstitutionally overbroad. Specifically, petitioner cites cases which state that an accused is not guilty of capital robbery-murder where the intent to rob was formed only after the victim was killed. *Connolly v. State*, 500 So.2d 57 (Ala.Crim.App. 1985), *aff'd*, 500 So.2d 67 (Ala. 1986); *Young v. Zant*, 506 F.Supp. 274 (M.D.Ga. 1980), *rev'd on other grounds*, 677 F.2d 792 (11th Cir. 1982).

Consideration of an invalid aggravating circumstance in a capital prosecution under a "weighing" statute is reversible error unless the State appellate court upholds the death sentence after either reweighing the aggravating and mitigating evidence or by harmless-error review. *Clemons v. Mississippi*, 494 U.S. 738, 110 S.C. 1441, 108 L.Ed.2d 725 (1990). Failure to perform such a reweighing or harmless error analysis at the appellate level, however, will result in setting the death sentence aside. *Sochor v. Florida*, 504 U.S. 527, 112 S.C. 2114, 119 L.Ed.2d 326 (1992).

The State appellate court considered this claim on direct appeal. It stated:

> The appellant also argues, that the trial court erred in charging the jury with the "aggravating factor that the killing occurred while Jerry Paul Henderson was engaged in a robbery." Appellate counsel argues in brief that "[i]t is clear from the facts of this case that the only act which could possibly be construed as a 'robbery' was Jerry Paul Henderson's taking Jerry Haney's wallet." The appellant further suggests that the wallet was taken as a "mere afterthought" and in Alabama does not constitute a capital offense.
>
> A murder is made a capital offense if committed during the course of a robbery. See § 13A-5-40(a)(2), *Code of Alabama* 1975. The murder and robbery must be a "continuous chain of events." *Hallford v. State*, 548 So.2d 526, 535 (Ala.Crim.App. 1988), *aff'd*, 548 So.2d 547 (Ala.), *cert. denied*, ___U.S. ___ ,110 S.C. 384, 107 L.Ed.2d 342 (1989), quoting *Thomas v. State*, 460 So.2d 207, 212 (Ala.Crim.App. 1983), *aff'd* 460 So.2d 216 (Ala. 1984)." . . . the taking of

> the property of the victim need not occur prior to the killing." *Hallford*, 548 So.2d at 535.
>
> In *Hallford*, the defendant took the victim's wallet after shooting him to death. After reviewing the jury instructions and the evidence, Judge Patterson concluded that indeed there was sufficient evidence to find the defendant guilty of capital murder "since the intervening time between the murder and the taking of the wallet formed a continuous chain of events." *Hallford*, 548 So.2d at 536.

Henderson, 583 So.2d at 297-98. The State appellate court then reviewed the jury charges. The charge regarding robbery in the first degree was given as follows:

> A defendant commits the crime of robbery in the first degree if he uses or threatens the use of force against the owner of personal property or any person present while in the course of committing a theft of personal property with the intent to overcome his physical power of resistance in order to compel his acquiescence in the taking of personal property and in the course of said theft either, (1) Intentionally causes serious physical injury or death to a person or, (2) is armed with a deadly weapon or dangerous instrument. Now in the course of committing a theft means acts which occur in the attempt to commit or in the commission of theft or in the immediate flight after the attempt or commission. A person commits the crime of theft of property if he knowingly obtains or exerts unauthorized control over the property of another with intent to deprive the owner of his property. An attempt occurs when a person, with intent to commit

> a specific offense does any overt act towards the commission of the offense.

Id. at 298. The court then reviewed the evidence and found as follows:

> The evidence showed the appellant came to Alabama to kill his brother-in-law for the sum of $3000. He shot the victim three times. One shot entered his left lower arm and remained in his left chest. One bullet grazed his left ear. The fatal bullet entered the victim's mouth. The defendant's wife testified that the appellant told her that he shot the victim after pleas from the victim not to shoot him. The appellant then took the victim's wallet. There was sufficient evidence for the jury to find the appellant guilty of the capital murder of Jerry Haney. (For a thorough discussion of cases dealing with sufficiency of evidence in a murder committed during the course of a robbery, see 67 A.L.R. 4th 887).
>
> Appellant also states that there was no evidence that prior to the killing he had the intent to rob. The jury was thoroughly instructed on the issues of intent, and intent is a question for the jury.

Id. at 299. The events recited by the trial court reflect a continuous chain of events which involved the use of force by Henderson against Jerry Haney followed by the theft of his wallet. The question of whether the taking of the decedent's wallet was a robbery or a "mere afterthought" was properly submitted to the jury.[8] Since the aggravating factor of murder

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[8] Given the evidence at trial of the extensive planning and preparation undertaken by petitioner in the course of the murder,

during the course of a robbery was not an invalid factor for the jury to consider, *Sochor* is inapplicable. Petitioner has failed to show that the decision of the Alabama Court of Criminal Appeals regarding this issue was contrary to clearly established Supreme Court law or an unreasonable application of the facts of this case to that law. Therefore, this issue is without merit.

Claim K - Improper Consideration by Trial Judge of Presentence Report

Petitioner asserts that the trial court improperly considered a presentence report which included improper statements and which was improperly withheld from Henderson and his counsel. Petitioner states that he did not receive the presentence report until the day of the sentencing hearing. He further states that it contained insufficient background information concerning psychological information and no information concerning petitioner's community reputation. In addition, petitioner asserts that it contained an inappropriate recommendation from the probation officer in favor of the imposition of the death penalty.

This issue was considered by the Alabama Court of Criminal Appeals and rejected. *Id.* at 302-03. The appellate court notes that the record reflects that petitioner received a copy of the presentence report prior to sentencing but that there is no indication in the record of when he received it. *Id.*

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it would be reasonable for a jury to conclude under the facts of this case that petitioner took the decedent's wallet to make it appear that Haney had been killed by someone whose sole intent was robbery, thereby diverting suspicion from himself. If so, then they could reasonably also conclude that petitioner intended to take Haney's wallet even before he killed him.

at 302. It further notes that in the direct appeal brief submitted by petitioner, counsel states that petitioner ". . . received the presentence report at most twenty-four hours before the sentencing hearing." *Id.* It concluded that there was no prejudice to petitioner because he did not deny any portion of the report during the sentencing or in later motions.

The appellate court also rejected petitioner's claim that the recommendation of the probation officer was improper. It noted that the report was prepared for the judge's benefit and was not shown to the jury. The trial judge evaluated the material in the report, considered the jury's recommendation and sentenced the defendant to death. The court found that the trial judge's findings were clearly substantiated on the record.

Petitioner has failed to show that the decision of the Alabama Court of Criminal Appeals was contrary to any clearly established Supreme Court law or that the law was applied unreasonably to the facts of this case. There is no evidence in the trial judge's findings that he improperly based his decision on the recommendation of the probation officer. Clearly, the trial judge was aware of his duty to independently weigh the aggravating and mitigating circumstances. In fact, the record clearly shows that the court considered the evidence presented at trial and the jury's recommendation before deciding what punishment to impose. There is no indication that the judge was under any mis-impression that he was bound to impose a death sentence due to the absence of any mitigating evidence or simply because a probation officer recommended it. Therefore, even assuming the probation officer's recommendation was improper, it was harmless beyond a reasonable doubt. This claim is without merit.

Issues Not Raised on Direct Appeal or in Rule 32 Petition

Petitioner has raised certain other issues that were not raised on direct appeal. Some of these issues were raised in a Rule 32 petition that was subsequently withdrawn by Henderson. Henderson now claims that his dismissal of his Rule 32 petition was not voluntary and, therefore, invalid. If so, that would avoid a procedural bar which would otherwise be present regarding his Rule 32 claims. However, certain claims asserted in his § 2254 petition were not raised on direct appeal or in the Rule 32 petition. Thus, even if his Rule 32 petition had not been withdrawn, certain issues would not have been considered because they were not contained in that petition. They include the following claims:

D. That death by electrocution constitutes cruel and unusual punishment;

I. That the trial court gave a faulty instruction of "reasonable doubt" by injecting the concept "moral certainty" into the jurors' consideration;[9]

J. That the trial court issued an improperly suggestive explanation of the jury verdict form;

M(III)(e)(2)(ii). That trial counsel was ineffective for failing to object to the prosecutor's statements regarding the lack of evidence of self defense;

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[9] This issue was raised in the Rule 32 petition as an ineffective assistance of counsel claim, but it was not raised as a discrete claim.

M(IV)(e). That trial counsel was ineffective for failure to object to death by electrocution as violative of the Eighth Amendment;

M(IV)(g). That trial counsel was ineffective for failure to object to an overly suggestive explanation of the jury verdict form;

M(V)(b). That appellate counsel was ineffective for failure to argue that death by electrocution was violative of the Eighth Amendment; and

M(V)(c). That appellate counsel was ineffective for failure to argue that the court's "reasonable doubt" instruction was an incorrect statement of law when it injected the concept "moral certainty" into the jurors' consideration.

A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claims in federal court absent a showing of cause for and actual prejudice from the default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.C. 2497, 2506-07, 53 L.Ed.2d 594 (1977). Such procedural default can arise in two ways. First, where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, *Sykes* requires the federal court to respect the state court's decision. *Atkins v. Singletary*, 965 F.2d 952, 956 (11th Cir. 1992), *cert. denied*, 515 U.S. 1165, 115 S.C. 2624,132 L.Ed.2d 1365 (1995); *Meagher v. Dugger*, 861 F.2d 1242, 1245 (11 th Cir. 1988). Second, if the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred due to a state-law procedural default, the federal court may foreclose

the petitioner's filing in state court; the exhaustion requirement and procedural default principles combine to mandate dismissal. *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir.), *cert. denied*, 525 U.S. 963,119 S.C. 405, 142 L.Ed.2d 329 (1998). *See also* 28 U.S.C. § 2254(b)(1)(A)("An application for writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . .").

In *Castille v. Peoples*, 489 U.S. 346, 109 S.C. 1056, 103 L.Ed.2d 380 (1989), the Supreme Court held that a federal habeas court could hold claims to be procedurally defaulted and therefore exhausted "if it is clear that [the] claims are now procedurally barred under [state] law." 489 U.S. at 351,109 S.C. at 1060. The Supreme Court also has held that the rule requiring state court procedural bar holdings to be clearly and expressly stated "is simply inapplicable in a case such as this one, where the claim was never presented to the state courts." *Teague v. Lane*, 489 U.S. 288, 298-99, 109 S.C. 1060, 1061, 103 L.Ed.2d 334 (1989).

In *Coleman v. Thompson*, 501 U.S. 722,735 n.1,111 S.C. 2256, 2257 n.1,115 L.Ed.2d 640 (1991), the Court reiterated that the clear-expression rule "does not apply if the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Thus, any issue unexhausted in State court for which an attempt to exhaust would result in a State procedural bar, is also procedurally barred from relief in federal court pursuant to 28 U.S.C. § 2254(b)(1)(A). *Accord Bailey v. Nagle*, 172 F.3d 1299 (11th Cir. 1999).

A habeas petitioner can escape the procedural default doctrine only by showing cause for the default and prejudice,

Murray v. Carrier, 477 U.S. 478, 488, 106 S.C. 2639, 2645, 91 L.Ed.2d 397 (1986), or establishing a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 324-27, 115 S.C. 851,865-67, 130 L.Ed.2d 808 (1995). The latter requires a colorable showing of actual innocence. *Id.*

To establish a sufficient "cause" for state procedural default, a habeas petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Carrier*, 477 U.S. at 488, 106 S.C. at 2645. Petitioner has, in his reply brief, asserted that the existence of Claims D, I, and J results from ineffective assistance of counsel. However, he never asserted in his Rule 32 petition that his failure to raise them at trial or on appeal was the result of ineffective assistance of counsel. Thus, even if he did not voluntarily waive his right to a Rule 32 proceeding, he nevertheless failed to assert these particular ineffective assistance issues in the petition that would have been considered. While ineffective assistance of counsel may serve as cause for a procedural default, *id.*, a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" to excuse the procedural default of another habeas claim only if the habeas petitioner could have satisfied the cause and prejudice standard with respect to the ineffective assistance of counsel claim itself. *Edwards v. Carpenter*, 529 U.S. 446, 120 S.C. 1587, 146 L.Ed.2d 518 (2000).

Where no constitutional right to counsel exists, however, ineffective assistance of counsel cannot constitute cause to excuse procedural default. See *Whiddon v. Dugger*, 894 F.2d 1266, 1267 (11th Cir. 1990), *cert. denied*, 498 U.S. 834, 111 S.C. 102, 112 L.Ed.2d 73 (1990). The Supreme Court has never established a constitutional right to counsel for prisoners mounting collateral attacks upon their convictions. *Pennsylvania v. Finley*, 481 U.S. 551,555,107 S.C.

1990,1993, 95 L.Ed.2d 539 (1987); *Whiddon*, 894 F.2d at 1267. Thus, "the right to appointed counsel extends to the first appeal of right, and no further." *Finley*, 481 U.S. at 555, 107 S.C. at 1993. Because Henderson had no constitutional right to counsel for the purpose of mounting a collateral attack upon his conviction, his failure to raise these issues in his state post-conviction petition cannot be excused because of ineffective assistance of counsel. *Golston v. State*, 947 F.2d 908 (11th Cir. 1991); 28 U.S.C. § 2254(i).

To summarize, the failure to raise Claims D, I, and J, at trial and on direct appeal in State court results in a procedural bar to bringing these claims in federal court. To avoid this bar, petitioner has alleged "cause" in the form of ineffective assistance of trial and appellate counsel. However, he did not first allege ineffective assistance of counsel in his Rule 32 petition as to these particular claims. Thus, the underlying ineffective assistance of counsel claims which might otherwise supply the "cause"to avoid procedural default are themselves procedurally defaulted. As a result, ineffective assistance cannot be used to justify the failure to raise these issues on direct appeal. *Edwards v. Carpenter*, *supra*. Because petitioner has offered no other basis for establishing cause nor any evidence to support a colorable showing of actual innocence, these issues are also procedurally defaulted.

The same is true with regard to the ineffective assistance of counsel claims asserted in Claims M(III)(5)(b)(ii), M(IV)(5) & (7),and M(V)(2) & (3). Even if the claims set forth in petitioner's Rule 32 petition had been considered on their merits, these particular issues have been procedurally defaulted since petitioner failed to raise them in his State

petition for collateral relief.[10] Therefore, Claims D, I, J, M(III)(5)(b)(ii), M(IV)(5) & (7), and M(V)(2) & (3) are procedurally defaulted and barred from consideration. 28 U.S.C. § 2254(b)(1)(A).

Issues Raised in Rule 32 Petition

The issues raised by petitioner in his Rule 32 petition and reasserted in his federal habeas action are as follows:

A. He was denied his rights under the United States Constitution by the prosecutor's use of peremptory challenges in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.C. 712, 90 L.Ed.2d 69 (1986) *(Batson* violation);

F (I). Prosecutorial misconduct deprived him of a fair trial, including *Batson* violations;

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[10] Subsequent to the denial of his motion for reconsideration of the dismissal of his initial Rule 32 petition, petitioner filed a second petition. Regardless of whether the dismissal of the first Rule 32 petition was appropriate, any attempt to add issues not raised in that petition would be barred as successive under Rule 32.2(b), Ala.R.Crim.P., and outside the two-year statute of limitations for filing such a petition set out in Rule 32.2(c), Ala.R.Crim.P. In fact, the trial court dismissed the second petition for these reasons, among others. See Talladega County Case No. CV-93-369, Order of Judge Jerry Fielding (Dec. 7, 1999). Thus, no grounds raised in the second Rule 32 petition that were not raised in the first petition will be considered by this court under any circumstance.

L. Alabama's scheme for compensating appointed counsel in capital cases denied petitioner effective assistance of counsel in violation of his constitutional rights;

M(I). Trial counsel rendered ineffective assistance by failing to seek adequate compensation from the State and failing to object to not receiving adequate compensation which resulted in insufficient devotion of time and resources to trial preparation, pretrial preparation, and the trial itself, including failing to obtain funds for an investigator to develop facts to defend the case and show mitigating circumstances;

M(II). Petitioner received ineffective assistance before trial exhibited by trial counsel's failure to:

a. obtain *Brady/Giglio* material regarding witness Martha Henderson, and
b. adequately prepare to litigate the motion for a change of venue;

M(III). Petitioner received ineffective assistance at trial because counsel:

a. failed to insist that the jury be "life-qualified,"
b. failed to object to the prosecutor's *Batson* violation,
c. stated they would show petitioner acted in self defense and that he

would take the stand in his own defense and that failed to do so,

d. failed to seek a cautionary instruction regarding petitioner's Fifth Amendment right not to testify,

e. failed to make crucial objections at trial such as:

(1) objecting to prejudicial courtroom conditions,

(2) objecting to prosecutorial misconduct including,

(i) the prosecutor's statement that he represented the family of the decedent,

(iii) references by the prosecutor to the suffering of the victim's family and the necessity to leave sympathy at the door when considering petitioner's penalty,

(iv) the prosecutor's statement to the jurors that each had pledged to vote for the death penalty, and

(v) the prosecutor's argument that, because there were only fourteen capital offenses under Alabama law, the jury should more readily, sentence the

petitioner to death for committing two of them;

(3) moving for a mistrial because of a *Brady/Giglio* violation, and;

(4) objecting to the trial court's "reasonable doubt" instruction.

M(IV). Petitioner received ineffective at the sentencing phase of petitioner's trial for failing to investigate or present important evidence of mitigating circumstances, including,

(a) failing to investigate petitioner's family history and other evidence relating to petitioner's background and personal history,

(b) failing to obtain mental health expert testimony regarding the effects of family-background on mental health and behavior,

(c) failing to investigate and obtain evidence of the violent nature of the decedent toward petitioner's sister-in-law and her children,

(d) failing to object to the trial court's instruction on "heinous, atrocious, and cruel" even though those instructions were constitutionally infirm,

(e) failing to object to death by electrocution as violative of the Eighth Amendment to the United States Constitution, and,

(g) failing to object to an explanation of the verdict form as being of such a suggestive nature as to imply that the appropriate sentence in petitioner's case was death.

M(V). Appellate counsel were ineffective because they:

(b) failed to argue that death by electrocution was cruel and unusual punishment prohibited by the United States Constitution, and,

(c) failed to argue that the trial court's instruction regarding reasonable doubt was erroneous.

Respondents state that the court should not consider these issues asserting that they are procedurally barred because petitioner failed to exhaust his State remedies by pursuing relief under Rule 32, Ala.R.Crim.P. The evidence reflects that, subsequent to filing his initial Rule 32 petition in State court, Henderson withdrew his petition and waived his right to a hearing on the issues raised therein. New counsel later tried to reassert these issues, alleging that Henderson's waiver was involuntary. The trial court and the Alabama Court of Criminal Appeals denied relief. *See Henderson v. State*, 583 So.2d 484 (Ala.Crim.App. 1998).

Petitioner now claims that he did not knowingly, intelligently and voluntarily waive his right to a hearing on his initial Rule 32 petition. It is asserted that petitioner first saw his attorney on the day before the scheduled hearing on his Rule 32 petition and that the attorney was ill-prepared and not competent. Petitioner also asserts that his waiver was involuntary because his court-appointed counsel for the 1997

Rule 32 proceeding, Steve Giddens, was the brother of a part-time assistant district attorney, Ron Giddens, who assisted in Henderson's original 1988 prosecution, albeit in a minor role. In addition, petitioner states that there is no evidence that he ever received an explanation of the specifics of the Rule 32 allegations or knew anything about them. Finally, petitioner asserts that the trial judge, in accepting petitioner's waiver of the Rule 32 proceedings, did not determine whether Henderson had any understanding of the particulars of the Rule 32 or of his ineffective assistance and other arguments.

Testimony was taken before the undersigned magistrate judge on June 25, 2001, on the potential Conflict of interest issue posed by the relationship of petitioner's Rule 32 counsel to a prosecutor involved Henderson's prosecution. At that hearing, attorney Steve Giddens testified that he has practiced law in Alabama since 1986, EH. at 5.[11] Although he did not know the victim or the victim's wife, Giddens acknowledged that he knows Billy Haney, the victim's brother. EH. at 11-12. He is acquainted with Haney due to the fact that Haney is a law enforcement officer in Talladega whom Giddens met when he began to practice law. He describes their relationship as "professional." EH. at 13.

Giddens testified that he was appointed in 1996 to represent Henderson in his Rule 32 petition by the trial judge, Jerry Fielding. EH. at 14. He first spoke to petitioner on the day before the scheduled hearing. EH. at 18. Prior to visiting with petitioner, he reviewed portions of the trial transcript that he believed were relevant to Henderson's claims and also

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[11] The transcript of the evidentiary hearing before the undersigned magistrate judge is hereinafter reference as EH. at ##, wherein ## constitutes the page number where the reference occurs.

reviewed the court file. EH. at 27-28, 43. However, he did not review closing arguments and never spoke to the trial attorneys nor petitioner's initial Rule 32 counsel, Mr. Jack John. EH. at 30, 35-36.

Giddens states that at the time he visited with petitioner, he reviewed with petitioner the claims in the Rule 32 petition and the potential relief. According to Giddens, Henderson responded by stating that he "was not sure what this was all about, that he did not have any problems with his attorneys because he was guilty and that they did as well as they could do defending a guilty man." EH. at 21. Giddens testified that he was surprised by this admission. EH. at 22.

Giddens testified that he initially had intended to talk to petitioner and then to either prepare for the hearing or move for a continuance if he thought he needed more time, such as to locate a witness or witnesses. He was confident that he would have been able to get a continuance if he had needed it. EH. at 24-25. However, after his conversation with petitioner, he concluded that Henderson had no complaint regarding his trial counsel and wanted the Rule 32 petition dismissed. EH. at 25.

Giddens testified that he told Henderson about the consequences of a dismissal, including the fact that the judge would hear no evidence or claims, and there would be nothing to appeal other than the issue of whether his waiver of the Rule 32 proceedings was voluntary. He also advised him that dismissing the Rule 32 petition would get him one step closer to execution. EH. at 44-45. Petitioner advised Giddens that he wanted the proceedings over with because he had done the crime. EH. at 46.

Giddens stated that, the following day, he made Henderson's wishes known to the trial court. EH. at 26. The trial judge then engaged in a colloquy with the petitioner to ascertain if his waiver was voluntary. During this exchange, Giddens did not tell petitioner what to say nor prompt him in any way. EH. at 51.

Giddens testified that, though he shared space with his brother at the time he was appointed to represent petitioner in the Rule 32 proceedings, he had not known that his brother had anything to do with the case until he got the court's notice for this hearing in the § 2254 proceedings. EH. at 35-36, 37, 42. While his brother was a part-time district attorney, Giddens had never known him to "second-chair" or otherwise participate in a capital murder case. EH. at 39.

Jerry Paul Henderson also testified at the evidentiary hearing. Henderson concurred with Giddens' testimony that he first met with Giddens on the day before the Rule 32 hearing. Henderson testified that he told Giddens that he was guilty of the crime and that he thought his attorneys at trial had done well at trial. EH. at 62.

Henderson testified that Giddens did not prompt him to go before Judge Fielding to withdraw his petition. He stated "I think we settled our conversation and it basically come down to that's what I thought I wanted to do." EH. at 63. Henderson stated that the judge went over the consequences of withdrawing his petition. When asked, "Did you understand that by withdrawing that petition, you would move up your date of execution?", petitioner responded, "I suppose so, yes." EH. at 64. He understood that the consequence of dropping his Rule 32 petition was that he would go to "the chair" more quickly. EH. at 66.

The colloquy among Giddens, Henderson, and the trial judge was reviewed by the Alabama Court of Criminal Appeals. It noted that, prior to the colloquy with Henderson, the following exchange occurred between the trial judge and Steve Giddens:

> THE COURT: Did you want to say something into the record at this time?
>
> MR. GIDDENS [appointed counsel for petitioner]: Yes, sir, Judge. I conferred with my client, Jerry Henderson, yesterday. I went over his petition with him, and yesterday was the first time he had actually seen the petition. He did not file it he tells me. He did not make those allegations. And looking at the petition myself, it was comprised, I believe, mostly of allegations of ineffective assistance of counsel -- either things his lawyer did during the trial or did not do during the trial or did not prepare for trial. Mr. Henderson tells me that he has no complaints personally -- or in this petition -- he wasn't sure what most of the allegations even meant. He has no complaints with either Mr. Pitts or Mr. Adams. He feels they represented him as well as they possibly could have at trial, and . . . he wants his petition dismissed.
>
> THE COURT: You have had plenty of time to talk to Mr. Henderson about this?
>
> MR. GIDDENS: I've conferred with him. I've done several of these petitions. I've tried several capital murder cases. I've talked with him, and it is my opinion he is of sound mind, and he knows as much about what he is doing as anybody I have ever

represented in my 11 years of doing this; and I believe that he fully understands what this petition means and what it means by being dismissed.

THE COURT: And he understands that there were allegations in the petition relative to incompetent counsel at the time of trial, and you went over that with him?

MR. GIDDENS: Yes, sir. He says that's not true. He's well satisfied that his attorneys did everything they could for him.

Henderson v. State, 733 So.2d at 486. Thereafter the following colloquy occurred between petitioner and the trial judge:

THE COURT: Let me go over just a few things, Mr. Henderson, so we can further put some things in the record. You can just stay right where you are. You can hear me can't you, Mr. Henderson?

DEFENDANT: Yes, sir. I can hear you fine.

THE COURT: You understand, Mr. Henderson, that you were tried in this courtroom, in fact, it will be 10 years ago or 9 years ago--

DEFENDANT: In May.

THE COURT: In May 1988. You remember that the jury convicted you of capital murder at that time. You remember that, don't you?

DEFENDANT: Yes, sir. I do.

THE COURT: You remember the jury came back and made a recommendation to the court that you should be sentenced to the electric chair for your punishment. You remember that, don't you?

DEFENDANT: Yes, sir.

THE COURT: And you remember that sometime later-- probably 30 or 40 days later that the court had another sentence hearing, and that at the conclusion of that sentence hearing the court went along with the recommendation of the jury and sentenced you to the electric chair. You remember that, don't you?

DEFENDANT: Yes, sir.

THE COURT: You also understand that your direct appeals of the case have all been affirmed. In other words, your appeal to the Alabama Supreme Court has been affirmed, and any appeal that may have gone to the federal system has been affirmed in the case, which means you lost your appeal. You understand that, don't you?

DEFENDANT: Yes, sir.

THE COURT: Okay. Do you understand that by filing this Rule 32 which is a post -- collateral action really -- that you are saying that something happened in the trial back in 1988 that would justify you getting a new trial. Do you understand that's what this Rule 32 is all about?

DEFENDANT: Yes, sir. I understand that.

THE COURT: Do you understand that if you dismiss your Rule 32 petition, which is what we are here for today to try, then the court cannot determine if anything did take place back then that would be in error. You understand that?

DEFENDANT: Yes, sir. I understand.

THE COURT: Do you understand by dismissing this petition that you are a step closer to having your sentence to the electric chair carried out? Do you understand that?

DEFENDANT: Yes, sir. I understand that.

THE COURT: Do you understand that by dismissing your petition for Rule 32 that you could hurt any appeal that you may have further on in the state courts and also in the federal courts if you decide to file a petition after today. Do you understand that?

DEFENDANT: Yes, sir. I understand that.

THE COURT: Do you understand that by dismissing your petition that you could be speeding up your date of execution? Do you understand that?

DEFENDANT: Yes, sir. I understand that.

THE COURT: In consideration of all of these things that I've talked about and what your lawyer's talked about and told the court, and after conferring with your lawyer, Mr. Steve Giddens, it is your decision to dismiss your Rule 32 petition and waive any further hearing today. Is that right?

DEFENDANT: Yes, sir. That's correct.

THE COURT: And you are making this decision of your own free will, knowingly and voluntarily. Is that correct?

DEFENDANT: Yes, sir. It is.

THE COURT: And no one has threatened you, coerced you, made promises or tricked you into making this decision that you have told us about today?

DEFENDANT: No, sir, they haven't.

THE COURT: And it's your decision after consideration of these things to dismiss your petition for Rule 32?

DEFENDANT: Correct. Yes, sir.

THE COURT: Anything from the State?

MR. CRENSHAW [assistant district attorney]: Only thing I would have, Judge -- just to note for the record -- that the petition was prepared by a Jack John with a Baltimore, Maryland, firm. Could I just ask Mr. Giddens to ask his client whether Mr. John has ever met Mr. Henderson?

MR. GIDDENS: Jerry, have you even personally met Mr. John?

DEFENDANT: Yes, sir. He come up to the prison and talked to me when they first put him on my case.

He basically asked me what happened in the sense of what brought it all about and everything and what happened in the courtroom and all of that; and I told him all the details. Then he left, and I never seen him after that. He sent me some papers and stuff, but I didn't know what they was for -- where he was making appeal -- but he asked me did I feel like -- he asked me then did I feel like I had adequate counsel. I said, "Yes, I do. I did." He said, "Well, I don't." I said, "Well, I believe Mr. Pitts and Mr. Adams done the best they could." I said that Mr. Adams was actually jumping up and down like a jumping bean, you know. Kind of upset Rumsey [district attorney] a little bit. I said that I thought they done good. But anyhow he said he was going to file that. He was my lawyer, so I left that decision up to him.

THE COURT: But today after talking to Mr. Giddens it is your desire to withdraw it and dismiss it?

DEFENDANT: Yes, sir.

THE COURT: One other thing. The record would show that other lawyers that were in this case either never got qualified to serve -- to be a lawyer in the State of Alabama as required by Alabama rules -- or they asked the court to withdraw, and I think that's how we ended up with Mr. Steve Giddens. Of course, for the record I would show that Mr. Steve Giddens has been practicing law in this circuit for more than 10 years. In fact, about 12?

MR. GIDDENS: Be 11, Friday.

THE COURT: I know personally that he has tried several capital murder cases in my courtroom, and he always does an outstanding job defending his clients, and so I wanted to put somebody on the case that would be able to represent Mr. Henderson appropriately; and I know that Steve would have done that if the case had gone forward, and I'm sure he would be prepared to go forward today, in fact. So, the court did pick Mr. Giddens, a well-experienced criminal defense lawyer. I say that you probably do 80% of your work in criminal defense, don't you?

MR. GIDDENS: Yes, sir, at least

THE COURT: I know he's tried capital cases in Talladega and I suspect Calhoun County also. I know he tried one in Coosa County.

MR. GIDDENS: Yes, sir. I did.

THE COURT: And he's had cases that have been not guilty's in fact, I'm sure. More than one in fact. I'm confident Mr. Giddens will be appropriate to represent Mr. Henderson today. Is there anything else you want to cover?

MR. CRENSHAW: No, sir. I don't have anything else.

THE COURT: Okay. The court, based on motion of the defendant, the court finds that the defendant is knowingly and freely and voluntarily making this motion and is not making it under threats, coercion or because of any promises or because of any trickery on anybody's behalf. He is doing it because he thinks it's

> the proper thing to do, and the court does hereby dismiss the petition for Rule 32. This matter is concluded.

Id. at 486-88. The Court of Criminal Appeals further noted that the trial judge later entered an order which stated as follows:

> The Court scheduled an evidentiary hearing on the Rule 32 petition for April 22, 1997. Appearing at the hearing for the State of Alabama was Assistant Attorney General Clay Crenshaw. Jerry Henderson was present at the hearing along with his appointed counsel, Steve Giddens. At this hearing. Mr. Giddens stated that he had discussed the Rule 32 petition with Henderson and that he discussed the allegations of ineffective assistance of counsel, which comprised most of the petition, with Henderson. Giddens stated that Henderson had no complaints about the performance of his trial counsel and that he wanted the Rule 32 petition dismissed. Giddens stated that he believed Henderson was of sound mind, and knew the consequences of dismissing the petition. The Court observed Henderson in the courtroom and finds that Henderson is of sound mind and knows the consequences of dismissing his Rule 32 petition. The Court engaged Henderson in a colloquy to determine whether he did understand the consequences of dismissing his Rule 32 petition . . . .
>
> Henderson stated that he realized the Rule 32 petition was filed in an effort to get a new trial. Henderson stated that he understood that he would not get a new trial. Henderson stated that he understood that, by dismissing the Rule 32 petition, he would be hurting

> any chances he might have on appeal from the Rule 32 appeal in the state appellate courts. Henderson stated that he knew, by dismissing his Rule 32 petition, that he was hurting his chances in federal court to win a new trial. Henderson stated that he knew, by dismissing the Rule 32 petition, he was speeding up the date of his execution. This Court observed Henderson during the colloquy and finds that Henderson is aware of the consequences of dismissing the Rule 32 petition. At all times, Henderson was aware, oriented, and knowledgeable about the consequences of his decision to dismiss the Rule 32 petition. The Court finds that Henderson is making this decision knowingly and voluntarily, and that he has not been threatened coerced, or tricked into making the decision to dismiss the Rule 32 petition.

Id. at 488-89.

The Court of Criminal Appeals concluded:

> The appellant's mental competence was not an issue at his trial or on direct appeal, was not an issue at the hearing on the appellant's motion to dismiss his petition, and has not been raised on this appeal. In fact, the appellant has never contended that he suffers from a mental disease or defect and there is no evidence suggesting that he does. There is no evidence in the record that he was not competent to dismiss his post-conviction petition, the record shows that he understood the legal options available to him and that he made a rational choice from those options.
>
> During the colloquy with the circuit court, the appellant answered the court's questions in a

responsive and coherent manner. He was knowledgeable about the legal system, the course of his trial, the challenges to his conviction and his sentence, and the post-conviction petition. The colloquy also demonstrates that he moved for a dismissal of the petition voluntarily, knowingly, and intelligently with an awareness of the consequences.

The circuit court's findings are essentially factual and are entitled to considerable deference and should be accepted unless shown to be clearly erroneous. *Streetman v. Lynaugh*, 835 F.2d 1521 (5th Cir. 1988); *Rumbaugh v. Procunier, supra.*
We conclude, after reviewing the record, that the circuit court was correct in finding that the appellant possessed the requisite mental competence to dismiss his petition and that he did so voluntarily, knowingly, and intelligently.

For the above reasons, the circuit court's judgment granting the appellant's motion and dismissing the petition is due to be, and it is hereby, affirmed.

Id. at 489-90.

Title 28 U.S.C. § 2254(e)(1)states as follows:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Therefore, the factual determinations by the trial court and the Alabama Court of Criminal Appeals are presumed correct for purposes of petitioner's § 2254 petition.

There is no right to counsel in post-conviction proceedings, including capital cases. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. Therefore, a petitioner must bear the risk of attorney error that results in procedural default. *Coleman v. Thompson*, 501 U.S. at 753, 111 S.C. at 2566. However, according to counsel for petitioner, "Mr. Henderson was clearly made aware that by waiving his Rule 32 Petition, he would be hastening the date of his execution. . . . But there is no support of record for the notion that Mr. Henderson knew what he was by waiving his Rule 32 Petition hearing that is, a right to have a judicial determination of the merits of certain, specific ineffective assistance allegations, which are listed above." [Doc. #1, Petition for Writ of Habeas Corpus, at ¶139]. Counsel also asserts that petitioner failed to receive any explanation of the claims raised in his Rule 32 petition nor knew anything specifically about them. [Doc. #28, Petitioner's Reply Brief, at 15. Thus, petitioner asserts that this waiver was not knowingly and intelligently made, even if voluntary.

This argument is without merit. The record evidence is clear that petitioner knew he was giving up his right to a Rule 32 hearing. He may not have understood all of the issues that he was foregoing, but that is not necessary. What is important is that he understood that he was giving up whatever rights he had and that the result of that decision would hasten his execution. The purpose of the "knowing and voluntary" inquiry is to determine whether the defendant actually understands the significance and consequences of a particular decision and whether the decision is uncoerced. *Godinez v.*

Moran, 509 U.S. 389, 401 n.12, 113 S.C. 2680, 2687 n.12, 125 L.Ed.2d 321 (1993) *(citing Faretta v. California*, 422 U.S. 806, 835, 95 S.C. 2525, 2541, 45 L.Ed.2d 562 (1975)). Clearly, petitioner understood the significance of what he was doing and the consequences thereof. Furthermore, the undersigned magistrate judge concludes that petitioner's Rule 32 counsel, Mr. Steve Giddens, was unaware of his brother's prior involvement in the original prosecution of Henderson and that there is no evidence that he exerted any undue influence on petitioner for that or any other reason. In short, Mr. Giddens' relationship to a prosecutor in this case was not a factor in petitioner's decision to waive his Rule 32 proceedings.

Consequently, the undersigned magistrate judge finds that petitioner has waived those issues raised in his Rule 32 petition because he dismissed that petition and cannot show cause and prejudice sufficient to overcome this procedural default.

CONCLUSION

Based on the foregoing, the undersigned magistrate judge RECOMMENDS that the petition for writ of habeas corpus be DENIED.

NOTICE OF RIGHT TO OBJECT

Any party who objects to this report and recommendation must, within fifteen (15) days of the date on which it is entered, file specific written objections with the clerk of this court. Failure to do so will bar any later challenge or review of the factual findings of the magistrate judge. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Am*, 474 U.S. 140, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied*, 474 U.S. 1111, 106 S. Ct. 899, 88 L.Ed.2d 933 (1986); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). In order to challenge the findings of the magistrate judge, a party must file with the clerk of the court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a district judge.

A party may not appeal a magistrate judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

DONE this 21st day of September 2001.

/s/
HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASE NO. CV00-BU-0941-E

[Filed June 21, 2001]

JERRY PAUL HENDERSON,	)
Petitioner	)
	)
vs.	)
	)
RON E. JONES, Commissioner of the	)
Alabama Department of Corrections,	)
and the ATTORNEY GENERAL OF	)
THE STATE OF ALABAMA,	)
Respondents	)
	)

ORDER

Respondents have filed an objection [Doc. #36] to the court's hearing set in this matter on June 25, 2001. It is noted that respondents filed this objection little more than a week before the scheduled hearing date when they clearly could have done so much sooner. Nevertheless, the court will expand upon its reasons for this hearing for the benefit of respondents.

Jerry Paul Henderson's § 2254 petition contains certain substantive issues that will be procedurally barred for failure to raise them at trial or on appeal unless he can show cause for his failure to do so and prejudice resulting therefrom. "Cause" for failure to raise issues at trial or on appeal may be based on ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.C. 2639, 2645, 91 L.Ed.2d 397 (1986). However, to qualify as a basis for "cause," the underlying ineffective assistance claim must not itself be procedurally barred. *See Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992); *Orazio v. Dugger*, 878 F.2d 1508, 1511 (11th Cir. 1989). Failure to raise a claim of ineffective assistance of trial and/or appellate counsel in a Rule 32 petition is normally a procedural bar to that substantive claim in federal court unless there is "cause" for and "prejudice" from the failure to raise the ineffective assistance of counsel claim in a Rule 32 petition.

Petitioner dismissed his Rule 32 petition. However, since petitioner is not entitled to counsel at a Rule 32 proceeding ineffective assistance of Rule 32 counsel cannot provide "cause" for failure to raise the claim of ineffective assistance of trial counsel and appellate counsel. "Cause" must be found in some external source outside of petitioner's control. *Murray v. Carrier, supra*. Thus, if petitioner waived his Rule 32 proceeding based only on bad advice from his Rule 32 counsel, he cannot prevail on any assertion of ineffective assistance of counsel in the instant case as a substantive claim or as cause for any procedural default. If, however, Henderson waived the Rule 32 proceeding as the result of undue influence, then there is the possibility that the waiver of the Rule 32 petition was involuntary. If the waiver is involuntary, then this may be "cause" sufficient to excuse petitioner's failure to pursue the claim of ineffective assistance of trial and appellate counsel in the Rule 32 proceeding.

"There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible." *Von Molthe v. Gillies*, 332 U.S. 708, 729, 68 S.C. 316, 326, 92 L.Ed.2d 309 (1948) (Frankfurter, J., concurring). The trial court never had the opportunity to address whether the apparent conflict of interest presented by defense counsel's relationship to a prosecutor in petitioner's case resulted in actions which could have subverted petitioner's free and responsible choice to decide whether to go ahead with the Rule 32 proceeding.

To allow an involuntary waiver of the Rule 32 proceeding would be contrary to clearly established federal law. Further, the existence of a conflict of interest by Rule 32 counsel, if it was present, could not have been discovered previously by petitioner unless he was informed of it by Rule 32 counsel himself. Therefore, he could not have raised this issue in his Rule 32 petition.

The court is concerned with three issues:

1) Was petitioner's attorney, Steve Giddens, acting under a conflict of interest when he represented petitioner at the hearing wherein petitioner waived his right to the Rule 32 hearing?

2) If so, was petitioner aware of it?

3) If there was a conflict of interest, did it prejudice the defendant, i.e., did petitioner's attorney improperly influence petitioner to drop his Rule 32 proceeding?

This is the sole purpose of the scheduled hearing, Respondents' objection is duly noted and OVERRULED.

The clerk is DIRECTED to furnish a copy of this order to all counsel of record.

DONE this 20th day of June, 2001.

/s/
HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASE NO. CV00-BU-0941-E

[Filed January 29, 2002]

JERRY PAUL HENDERSON, Petitioner	)
vs.	)
RON E. JONES, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents	)

ORDER REGARDING APPEAL IN HABEAS CASE

PART 1

(A) Petitioner has been permitted to proceed *in forma pauperis* in this action and has filed a Notice of Appeal. Pursuant to FED. R. APP. P. 24(a)(3) this Court hereby certifies for the reasons stated below one of the following:

[X] 1. This appeal is taken in good faith and the petitioner is otherwise entitled to proceed on appeal *in forma pauperis*; or

[ ] 2 This appeal is not taken in good faith and authorization to proceed on appeal *in forma pauperis* is therefore DENIED; or

[ ] 3. That petitioner is not otherwise entitled to proceed on appeal *in forma pauperis*.

(B) The reasons for this Court's decision are:

[ ] Previously stated in this Court's Order dated _____.

[X] Other: One of the claims raised by petitioner presents issues fairly debatable among reasonable jurists.

PART II.

Pursuant to 28 U.S.C. § 2253 (as amended), an appeal may not be taken in this action unless the court issues a certificate of appealability. Such a certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

A certificate of appealability is GRANTED as to petitioner's claim that the waiver of his right to proceed under Alabama Rule 32 was not knowing,

voluntary or intelligent and that petitioner was unduly influenced by an attorney with a conflict of interest, in that petitioner has made a substantial showing of the denial of a constitutional right. A certificate of appealability is DENIED as to all other claims raised by petitioner because he has not made a substantial showing of the denial of a constitutional right.

Petitioner is ADVISED that he may file a request for certificate of appealability directly with the Court of Appeals, for the Eleventh Circuit.

DONE this the 6th day of December, 2001.

/s/
H. DEAN BUTTRAM, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASE NO. CV00-BU-0941-E

[Filed January 18, 2001]

JERRY PAUL HENDERSON, Petitioner	)
vs.	)
RON E. JONES, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents	)

ORDER

It is ORDERED that an evidentiary hearing is SET in this action for **February 21, 2001**, commencing at **10:00 a.m.** in the Hugo L. Black Federal Courthouse in **Birmingham, Alabama**. The only issues that will be addressed at the hearing are: (1) what petitioner was told by his attorney prior to dismissing his Rule 32 petition in state court; (2) whether Steve Giddens, petitioner's Rule 32 counsel, was aware at the time of petitioner's Rule 32 proceeding that his brother had

prosecuted petitioner; whether he discussed this fact with petitioner; and if he did not discuss this fact with petitioner, why he did not do so; and (3) if Steve Giddens did not discuss with petitioner the fact that his brother had prosecuted petitioner, whether the lack of disclosure deprived petitioner of the opportunity to make a knowing, intelligent and voluntary waiver of his right to pursue collateral relief, such that the state court's finding that petitioner knowingly, intelligently and voluntarily waived his right to pursue collateral relief is an unreasonable determination of the facts in light of the evidence presented.

The clerk is DIRECTED to furnish a copy of this order to all counsel of record; the Warden of William Donaldson Correctional Facility; Alabama Department of Corrections, Legal Division; Alabama Department of Corrections, Central Records; and the United States Marshal Service.

DONE this 18th day January, 2001.

/s/
HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE

APPENDIX I

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall

determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

HISTORY:
(June 25, 1948, ch 646, § 1, 62 Stat. 967; Nov. 2, 1966, P.L. 89-711, § 2, 80 Stat. 1105; April 24, 1996, P.L. 104-132, Title I, § 104, 110 Stat. 1218.)